BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
TCR Sports Broadcasting Holding, L.L.P.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. _____
	)	
Comcast Corporation,	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF CARRIAGE AGREEMENT COMPLAINT

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Dated: August 3, 2005

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TO: The Commission.

Complainant TCR Sports Broadcasting Holding, L.L.P. ("TCR"), doing business as Mid-Atlantic Sports Network, Inc. ("MASN"), hereby files this Reply in Support of its Carriage Agreement Complaint, which was filed on June 14, 2005.

INTRODUCTION AND SUMMARY

Comcast Corporation ("Comcast") contends that Commission intervention in carriage disputes should be "exceptionally rare," and that such disputes should be left to the give and take of ordinary commercial negotiations.[1] But Congress mandated, and the Commission implemented, the carriage provisions precisely because of a concern that incumbent cable providers could abuse their market power to discriminate against and/or exact improper concessions from unaffiliated programmers. That is exactly what has happened here, and, unless the carriage provisions are to become a dead letter, they must be enforced against Comcast.

[1] Answer ¶ 1.

There can be no genuine dispute that Comcast has sufficient market power to harm unaffiliated programmers. In TCR's two key target markets – Baltimore and Washington, D.C. – Comcast's network consists of approximately *two-thirds* of all cable subscribers in the region, and approximately half of all MVPD subscribers.[2] And that is only the beginning. Comcast has sought this Commission's approval to obtain assets from Adelphia that would push its share of the Baltimore and Washington markets to *80 percent* of cable subscribers and 60 percent of total MVPD subscribers.[3]

This Commission has recognized that, "in a highly concentrated market," such as this one, a single, dominant cable incumbent has the power to "determine the success or failure of a programming network, an outcome Congress sought to prevent."[4] Without carriage by Comcast, TCR will find it impossible "to reach a critical level of subscribership quickly in order to achieve

[2] *See* Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005* & *Basic and Digital Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005); Letter from Arthur H. Harding, Fleischman & Walsh, L.L.P, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192 (June 21, 2005) ("June 21, 2005 Supplemental Time Warner Data"). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

[3] June 21, 2005 Supplemental Time Warner Data; Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants. The Adelphia deal will also extend Comcast's reach to approximately 60-66 percent of all homes within that territory. *See* Media Business Corp., *Cable Homes Passed by DMA* (July 2005); Nielsen Media Research, *U.S. Television Household Estimates* (Sept. 2004). The lower range of the estimate is based on a denominator of U.S. Postal Service households estimated by Media Business Corp.; the higher range of the estimate is based on a denominator of households by DMA as reported by Nielsen Media.

[4] Further Notice of Proposed Rulemaking, *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312, ¶ 28 (2001) ("*1992 Act FNPRM*"); *see also* Complaint Ex. 9 (Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, FCC 05-13, ¶ 145 (rel. Feb. 4, 2005)) ("Eleventh Annual Report") ("Our examination of vertical integration in the MVPD industry focuses on ownership affiliations between video programming distributors and video programming suppliers. These vertical relationships . . . may deter competitive entry in the video marketplace and/or limit the diversity of programming."); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, 17 FCC Rcd 23246, ¶ 36 (2002) ("*AT&T/Comcast Order*") ("Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.").

long-term financial viability."[5] In view of these hard facts, it is clear that TCR's viability as an RSN is in Comcast's hands.

It is equally clear that Comcast is abusing its position as a cable provider to strangle TCR in its infancy and to protect Comcast SportsNet Mid-Atlantic L.P. ("CSN"), its own, affiliated RSN. Comcast has not even made a secret of that fact. It has baldly stated to both Congress and the press that a second RSN in the mid-Atlantic region is "unnecessary" and should not be allowed to develop.[6] It has asserted in court pleadings that the development of TCR will harm CSN.[7] All regional sports programming in the Baltimore-Washington region, in Comcast's view, should be produced and exhibited by CSN and only by CSN. As a result, despite repeated public claims that it is eager to carry the Nationals on its cable systems, Comcast has absolutely refused to distribute TCR's programming.

It would be hard to imagine a clearer case of discrimination. Comcast's arguments to the contrary are wholly unconvincing. Comcast points out that it carries unaffiliated RSNs in other markets where it has an affiliated RSN and suggests that such carriage shows that it does not fear competition. In the majority of these markets (five of seven), the unaffiliated RSN was in existence (and on Comcast's system) before Comcast formed the affiliated RSN, and Comcast is currently engaged in a concerted effort to drive those unaffiliated RSNs out of business. Comcast points out that other MVPDs are also not carrying TCR, but that is because of a vicious campaign of threats and intimidation launched by Comcast. In any event, Comcast's argument ignores the fact that Comcast itself, because of its market power in the target region, is the only

[5] Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, ¶ 51 (2000) ("*AT&T/MediaOne Order*").

[6] *See* Complaint Ex. 24 (Letter dated April 21, 2005 from D. Cohen to various members of Congress).

[7] *See* Complaint Ex. 22 (Complaint, *Comcast SportsNet Mid-Atlantic L.P. v. Baltimore Orioles L.P. et al.*, Civil Action No. 260751-V, ¶ 7 (Md. Cir. Ct. filed Apr. 21, 2005)) ("Comcast Complaint").

truly critical MVPD for TCR. Comcast cites a lawsuit that it filed in Maryland state court – in which it claims that its rights to Orioles games after the 2006 season have been breached – as a reason not to carry the Nationals games produced by TCR. Not only is it absurd on its face to link a dispute over the televising of Orioles games beginning in 2007 with the televising of Nationals games in 2005, but Comcast's lawsuit has been dismissed for a failure to state a claim on which relief can be granted. Finally, Comcast raises a variety of so-called "business justifications" for its refusal to negotiate carriage – such as the lack of 24/7 programming, the cost, and the lack of channel space – that are demonstrably pretextual, as explained in the body of this reply and in the attached affidavits.

Comcast's defense of its demand for an equity interest in any RSN that carries the Nationals and the Orioles is equally unavailing. Comcast advances three grounds for why it is not liable for the improper equity demands made on its behalf by Stephen Greenberg, an investment banker with Allen & Company: (1) Comcast could not have improperly sought an equity interest during the negotiations between the Orioles, TCR, and MLB because TCR was not an RSN until March 28, 2005; (2) Greenberg was not Comcast's agent and therefore could not have conveyed Comcast's demand for an equity interest as a condition of carriage; and (3) any demand for equity was in any event appropriate under the Commission's rules.

None of those arguments has any merit. First, the demand for an equity interest in a proposed two-team RSN conveyed before the assignment of the Nationals' telecast rights to TCR falls within the letter and spirit of the prohibition contained in the Commission's rule. Second, the question whether Greenberg was or was not, in any formal sense, acting as Comcast's "agent" – a question that can be resolved only through factual discovery – is, in an important respect, ultimately not necessary for the Commission to decide. The key point, which Comcast

does not rebut, is that Greenberg accurately conveyed Comcast's demand for an equity interest. Third, Comcast's argument in defense of its equity demand – which depends on the assertion that Comcast intended to swap CSN's equity for an interest in a new multi-team RSN – has no factual support: in fact, Comcast demanded an equity interest in a two-team network to which it would contribute no significant equity of its own.

The Commission is at a crossroads. It has never once, since the passage of the non-discrimination and other carriage provisions enacted by Congress, acted to enforce those rules. If it does not do so now, those provisions might just as well be dropped from the statute books, and Comcast be issued a free pass to monopolize sports programming in the Baltimore-Washington area, with drastic effects in the downstream MVPD market.

Comcast has already flexed its monopoly power to foreclose competition through its control of regional sports programming in the Philadelphia area, by using its dominance as a cable provider to maintain the dominance of its RSN and, in turn, to foreclose competition from competing MVPDs and RSNs. Comcast's RSN in Philadelphia controls the production and exhibition rights for three professional sports teams, and Comcast has refused to offer that programming to any competing DBS providers.[8] As a consequence, competition has suffered greatly. In the Philadelphia area, DBS subscription rates are *less than half* the national average,[9] and the absence of meaningful competition from DBS has foreclosed independent RSNs from gaining a foothold in the Philadelphia market without Comcast's blessing. Comcast has thus used its cable power and regional sports programming dominance to the detriment of competition and consumers.

[8] Complaint Ex. 22 (Comcast Complaint ¶ 10).

[9] *See* Jonathan M. Orszag et al., *An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers* 22-23 (Jan. 2002) (Exhibit 1 to Reply Comments of EchoStar Satellite Corp., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290 (FCC filed Jan. 7, 2002)).

Comcast appears to be pursuing a similar result here. Comcast is seeking to expand its cable dominance – both nationally and in the Baltimore-Washington region – through its proposed acquisition of Adelphia. By consolidating its power in the Baltimore-Washington region, Comcast aims to create a means of depressing competition from other MVPDs – especially satellite providers, as it has done in Philadelphia. If Comcast succeeds in crushing TCR, it alone will be in a position to control the production and exhibition of all regional sports programming in the mid-Atlantic region, as well as the distribution of that programming. This Commission can and should prevent that result, by forcing Comcast to cease its unlawful refusal to carry TCR on the basis of nonaffiliation.

ARGUMENT

I. COMCAST HAS UNLAWFULLY DISCRIMINATED AGAINST TCR BASED UPON ITS LACK OF AFFILIATION WITH COMCAST

A. Comcast Has Discriminated Against TCR On the Basis of Nonaffiliation

In its Complaint, TCR demonstrated that Comcast's refusal to carry TCR's programming discriminates against TCR based on TCR's lack of affiliation with Comcast. Comcast's steadfast refusal even to engage in any serious or meaningful negotiations to carry TCR's production of Nationals games – coming on the heels of Comcast's own aggressive efforts to secure the rights to those same games for itself – is explicable only as an effort to thwart the development of a rival to Comcast's affiliate, Comcast SportsNet Mid-Atlantic, L.P. ("CSN"), and thereby to entrench CSN's – and Comcast's – regional dominance in the Baltimore-Washington market.

Comcast's Answer sets forth a grab bag of alleged justifications for its actions. But these rationalizations are demonstrably pretextual. Shorn of Comcast's *post hoc* excuses, Comcast's ongoing refusal to deal with TCR is based on nothing more than its desire to prevent TCR from gaining a foothold to compete against CSN.

1. Comcast's Carriage of RSNs in Other Markets Does Not Excuse Its Unlawful Behavior Here

Comcast relies first and foremost on the fact that, in *other* regions involving *other* networks in *other* circumstances, it carries unaffiliated RSNs, and it maintains that this fact provides "strong evidence that the issue of 'affiliation or nonaffiliation' does not drive its carriage determinations."[10]

Comcast's claims about its willingness to carry other unaffiliated RSNs in other regions are beside the point. *This* case is about Comcast's unwillingness to carry TCR in the Baltimore-Washington region. In *this* region, TCR is producing and exhibiting Nationals games, which CSN sought vigorously, if unsuccessfully, to produce and exhibit. Moreover, in *this* region, TCR has announced its plans to produce and exhibit Orioles games after expiration of the Orioles' deal with CSN, leaving CSN with the specter of not having any Major League Baseball programming beginning with the 2007 season. Although CSN has the Wizards and Capitals under contract for years to come, it obviously views the loss of baseball as a major threat to its programming interests. Indeed, in Comcast's view:

> The Orioles' local pay television rights always have been one of the cornerstones of CSN regional sports network. These rights are particularly valuable because of the popularity of the Orioles in the Washington-Baltimore region, the large volume of live programming available as a result of the Orioles' 162-game regular season schedule (a schedule that is roughly equal to the NBA Washington Wizards' franchise and the NHL Washington Capitals' franchise schedules combined), and the lack of other local sports programming alternatives during the summer months.[11]

TCR, in short, is viewed by Comcast as a serious threat to Comcast's affiliated RSN in this region. For that reason, Comcast is refusing to carry TCR's programming. The fact that

[10] Answer ¶ 29.

[11] Ex. 1 (Memorandum in Opposition to Defendants' Motions to Dismiss, *Comcast SportsNet Mid-Atlantic L.P. v. Baltimore Orioles L.P., et al.*, Civil Action No. 260751-V, at 3 (Md. Cir. Ct. filed July 12, 2005)).

Comcast may, in other regions, carry unaffiliated RSNs that do *not* pose a comparable threat is beside the point.

The suggestion by Comcast that it tolerates competition from other RSNs in other markets is unpersuasive for another reason. In many of the markets cited by Comcast, the non-affiliated RSN was in existence well *before* Comcast's affiliated RSN was on the air. Such is the case in Boston, Chicago, Detroit, New York, and Sacramento/San Francisco.[12] Thus, when Comcast (or its predecessors) first agreed to carry the unaffiliated RSNs in these regions, Comcast did not have its own RSN to protect. Accordingly, Comcast's decision to carry these networks could not have been detrimental to a Comcast affiliate. It is hardly surprising that Comcast would decide to carry these networks, because they had exclusive rights to regional sports programming of interest to potential cable subscribers. In those regions, Comcast thus did not have the same incentive it has here – to thwart the development of a nascent RSN and thereby to lock up valuable regional programming for its affiliated RSN.

Indeed, if anything, Comcast's actions in these other regions only confirm that Comcast recognizes the competitive threat posed by unaffiliated RSNs and will act accordingly. In each of these regions, Comcast has subsequently started its own affiliated RSN with the aim of killing off the independent RSNs. And Comcast is succeeding. In each case, the creation of a Comcast affiliate has been at the expense of the pre-existing independent RSN.[13] Thus, for example, in Chicago, "[f]or all practical purposes, the premiere of Comcast SportsNet Chicago also sounds the death knell for Fox Sports Net, which has existed in various forms and under various owners

[12] *See* Complaint Ex. 9 (Eleventh Annual Report at Table C-4). The only regions in which this is not true are Atlanta and Southern Florida.

[13] Ex. 2 (R. Grover, *et al.*, *Rumble in Regional Sports*, BusinessWeek, Nov. 22, 2004) (explaining that Comcast's negotiations to gain television rights in Chicago, New York, and Sacramento has left the competing networks "out in the cold").

for 20 years."[14] As one commentator has noted, "It's almost certain [Comcast] will obtain FSN Chicago, as it has already siphoned all of the pro sports rights from the network to create Comcast SportsNet Chicago, in partnership with four local sports teams."[15]

Comcast, in short, is hardly the unbiased conduit of regional sports programming it claims to be. Comcast knows the threat posed by competing RSNs, and it acts aggressively to meet and defeat that threat. Here, that means attempting to strangle TCR in its infancy, by refusing to provide carriage to the MVPD subscribers TCR needs to survive. But because such refusals are based on TCR's non-affiliation with Comcast, they are prohibited by and in stark defiance of the Commission's rules.

2. The Fact that Other MVPDs Have Not Yet Agreed To Carry TCR's Programming – Due in Large Part to Comcast's Threats To These MVPDs – Does Not Alter the Reality that Comcast Is Discriminating Against TCR

Comcast next relies on the fact that TCR has yet "to reach carriage arrangements with numerous MVPDs other than Comcast."[16] As Comcast sees it, because other MVPDs are not yet carrying TCR's programming, Comcast's own refusal to engage in meaningful negotiations for such carriage must be based on reasons other than discrimination.[17]

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[14] Ex. 3 (R. Feder, *Kickoff Time Is Here for New Sports Channel*, Chicago Sun-Times, Oct. 1, 2004).

[15] Ex. 4 (R. Thomas Umstead & M. Reynolds, *Regional Openings for Comcast*, Multichannel News, Feb. 28, 2005). The creation of the Mets Network – a joint venture involving Comcast – threatens to have a similar effect on the competing non-affiliated RSN, MSG, which will lose the rights to televise Mets games. *See, e.g.*, Ex. 5 (B. Raissman, *Larry Move Would Rate at MSG*, N.Y. Daily News, July 22, 2005, at 3) ("Once the cash cow of the Garden empire, the MSG Network has lost its power and impact. MSG is in fierce competition for eyeballs and advertisers with the Yankees Entertainment & Sports Network. In 2006, another competitor, the Mets Network, will join the fray."); B. Raissman, *MSG Net Selects Bair*, N.Y. Daily News, Jan. 7, 2005, at 110) ("[Recently named MSG Networks president Mike Bair] arrives at MSG/FSNY during a time when both networks are in decline and, after the 2005 Mets season, will have no marquee summer programming. Fred Wilpon, along with Time Warner and Comcast, will debut a Mets Network in 2006.").

[16] Answer § III(B)(2), at 19-20 & ¶ 31.

[17] *See id.*

This claim is astonishing. As the Complaint explains, a principle reason for TCR's difficulties in obtaining carriage has been Comcast's orchestrated campaign to *prevent* TCR from reaching affiliation agreements.[18] That campaign included an April 21, 2005, blitz of dozens of letters to other MVPDs threatening legal action against those MVPDs if they contracted with TCR.[19] Where such an MVPD did contract with TCR, Comcast issued a second letter threatening legal action.[20] These threats, moreover, are based on the same discredited legal theory that, as noted at the outset and explained further below, has now been dismissed as meritless on the pleadings. Comcast cannot undertake to prevent MVPDs from negotiating carriage agreements with TCR – on the basis of legal claims that have now been conclusively adjudicated as baseless – and then use the success of that campaign to defend its own discriminatory conduct.

Comcast nevertheless claims that "[n]one of these MVPDs has an ownership interest in an RSN in the greater Washington, D.C. area, so [TCR's] failure to reach carriage agreements with these distributors must be attributable to factors other than 'discrimination on the basis of affiliation.'"[21] But Comcast omits key facts: two of the major MVPDs it mentions – Adelphia and Time Warner – are currently in the midst of a $17.6 billion business transaction *with Comcast*, pursuant to which Comcast is acquiring Adelphia's cable operations *in TCR's target region*.[22] And Charter – another of the MVPDs cited by Comcast – is a partner with Comcast in

[18] *See* Complaint ¶¶ 57-60.

[19] *See id*. Ex. 23 (Letters dated Apr. 21, 2005 from J. Williams, President & CEO, Comcast SportsNet to various MVPDs).

[20] *See id* Ex. 25 (Letter dated May 9, 2005 from J. Williams, Comcast SportsNet to M. Thornton, Sr. Vice President, DirecTV).

[21] Answer ¶ 31.

[22] *See* Ex. 6 (C. Isidore, *Adelphia Deal To Shuffle Cable: One in 10 Subscribers To Get New Operator as Result of $17.6B Purchase by Comcast, Time Warner*, CNN/MONEY, Apr. 21, 2005, *available at* http://money.cnn.com/2005/04/21/technology/adelphia). Lest there be any doubt about the close relationship between Comcast and Adelphia, Comcast's counsel in this case represents Adelphia in the merger proceedings.

an RSN in Bristol, Virginia, *a region in which TCR's programming is to be offered*.[23] Far from demonstrating a lack of discrimination by Comcast, TCR's lack of success in reaching agreements with Adelphia, Time Warner, and Charter demonstrates Comcast's heft and the unwillingness of other cable incumbents to cross it.

Finally, and in all events, *none* of the MVPDs identified by Comcast is on a comparable footing with Comcast itself. None of them, for example, provides service to more than 1.3 million subscribers in the heart of TCR's target area: the Baltimore-Washington region. Likewise, none of these other MVPDs aggressively negotiated for the rights to produce and broadcast Nationals games on an affiliated RSN, and were outnegotiated for those rights. In short, none of these alternative MVPDs has the same incentive and demonstrated intent to discriminate against the programming offered by TCR, and their actions therefore shed no light on the lawfulness (or lack thereof) of Comcast's steadfast refusal to deal.

3. Comcast's Frivolous Lawsuit – Which Has Since Been Dismissed by the State Court – Does Not Justify Comcast's Carriage Decision

Comcast next contends that its refusal to negotiate carriage of TCR is justified by TCR's supposed breach of Comcast's contractual rights. As Comcast tells it, CSN possessed exclusive rights to negotiate for Orioles games following the conclusion of the 2006 season, and TCR supposedly breached those rights by transferring the Orioles games to TCR (doing business as MASN).[24]

This claim fails on multiple levels – the first of which is the absurdity of Comcast's legal position. As Comcast could have – and should have – realized before filing a frivolous lawsuit,

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Comcast nevertheless asks that the Commission ignore this relationship to pretend that Adelphia's actions were not affected by Comcast's insistence that Adelphia not carry MASN.

[23] *See* Ex. 7 (CSS website, "About Us," *available at* http://csssports.com/about_us.cfm).

[24] *See* Answer ¶¶ 34-38.

MASN is simply a *trade name* registered by TCR; it is not, as Comcast appears to have assumed, a distinct legal entity.[25] TCR accordingly did not license the rights to Orioles games for 2007 and beyond to *anyone*; it simply kept those rights for itself. As the Maryland court in which Comcast pursued its spurious claims has now conclusively ruled, TCR was plainly within its rights to do so, and Comcast's contention to the contrary is without merit.[26]

In fact, Comcast's frivolous lawsuit bolsters TCR's claim that Comcast is attempting to squash TCR before it gains a foothold and is able to offer significant competition to CSN. Despite the fact that TCR's counsel promptly informed Comcast's counsel that MASN was not a distinct legal entity,[27] rendering Comcast's claims baseless, Comcast persisted in its suit and persisted with its baseless allegations that MASN is a distinct legal entity. Comcast's decision to continue the prosecution of a baseless lawsuit – and to *rely* on the pendency of that suit as a reason to refuse to negotiate carriage of TCR – demonstrates the absence of any colorable, lawful rationale for Comcast's refusal to deal.

Moreover, even if Comcast's lawsuit had raised a facially viable claim – which it did not – any alleged breach of contract by TCR with respect to Orioles telecast rights was and is irrelevant to Comcast's refusal to negotiate TCR's programming of the Nationals games. In its answer in this action, Comcast asserts that all of the carriage agreements proposed by TCR to Comcast explicitly contemplated carriage of both Nationals and Orioles games.[28] That is incorrect. As Comcast itself admits two paragraphs later, TCR sent a proposal to Comcast under

[25] It is hard to understand how Comcast could not have been aware of this fact before filing its suit. If Comcast and its counsel conducted the necessary due diligence before filing its action, it would have surely searched the records of the Maryland State Department of Taxation and Assessment to determine whether MASN was a corporate entity. Such a search would have demonstrated that MASN is merely a trade name for TCR.

[26] A copy of the portions of the transcript in which the court rendered judgment from the bench dismissing Comcast's claims is attached hereto as Ex. 8 (transcript pages 113-123).

[27] *See* Complaint Ex. 26 (Letter dated May 13, 2005 from W. Murphy to J. Quinn and R. Barnett) ("May 13 Letter").

[28] *See* Answer ¶ 36.

which Comcast would carry TCR's production of Nationals games *only* for the 2005 and 2006 seasons, and its production of Orioles games for the 2007 season and beyond *only* in the event that the Orioles and TCR prevailed in the lawsuit filed by Comcast.[29] TCR thus explicitly requested that Comcast televise Nationals games regardless of how the dispute between TCR and Comcast over Orioles games was resolved.

Comcast mischaracterizes this proposal as an effort to *link* the litigation over the Orioles rights to carriage of Nationals games.[30] On the contrary, TCR's proposal was an effort to *delink* the two by allowing Comcast to carry only Nationals games if Comcast's legal position were upheld. Comcast cannot have it both ways, arguing that its litigation against the Orioles was a proper reason to refuse carriage of the Nationals games, and then complaining that TCR improperly linked the litigation and the carriage agreement by offering a proposal under which Comcast would carry only Nationals games in the event that its position prevailed.

Under the guise of discussing its frivolous lawsuit, Comcast makes baseless and irrelevant attacks on TCR, the Orioles, and Major League Baseball. In particular, Comcast contends that the deal struck between Major League Baseball and the Orioles was unfair to the Nationals – and will somehow work to the detriment of Nationals fans – because the Orioles and Nationals will receive the same rights fees and because the Orioles will own a greater share of TCR than will the Nationals. The charge of unfairness – which is false – is also beside the point. The question here is whether Comcast discriminated against TCR on the basis of its non-affiliation with Comcast. The key fact is that TCR has rights to programming that Comcast has aggressively sought for its own affiliated RSN. Comcast plainly perceives TCR's programming

[29] *See id.* ¶ 38.

[30] *See id.*

as a threat to CSN. How TCR obtained that programming, or what terms it agreed to give up in exchange for those rights, is irrelevant.

In any event, Comcast's assertion that the deal struck by MLB, TCR, and the Baltimore Orioles is unfair to the Nationals is without merit. First, Comcast's assertion ignores the critical fact that the Orioles relinquished a significant asset in this transaction – its right (subject to certain MLB limited exceptions) to broadcast MLB games in the Baltimore-Washington television region. If the Nationals were to have *any* television rights, MLB and the Nationals were going to have to reach an agreement with the Orioles under existing MLB rules. The necessary parties – MLB, the Nationals, and the Orioles – ultimately determined that the fairest way to compensate the Orioles for giving up exclusive television rights in the region was to transfer the rights to produce and exhibit the Nationals games to the Orioles-controlled, pre-existing RSN, TCR. Contrary to Comcast's assertion, the Orioles' larger equity share in TCR is not an unfair advantage given to the Orioles; this larger equity share compensates the Orioles for giving up its exclusive right to exhibit MLB games in the Baltimore-Washington region and for the economic damage to the Orioles franchise from having the Nationals nearby.

Moreover, the deal is good for the Nationals because it gives the club an equity interest in the entity that is producing and broadcasting the games and not just a mere television licensing fee. In the deal that was struck, the Nationals were given not only a right to receive a licensing fee from TCR – a fee that after a set number of years of escalating rights fees is to be set at fair market value (as ultimately determined by MLB)[31] – but also an interest in all profits earned by TCR. Comcast never offered the Nationals a deal that would have included both a licensing fee

[31] *See* Complaint Ex. 1 (Agreement dated March 28, 2005 by and Among the Office of the Commissioner of Baseball d/b/a Major League Baseball, TCR Sports Broadcasting Holdings, L.L.P., Baseball Expos, L.P. d/b/a Washington Nationals Baseball Club, and the Baltimore Orioles Limited Partnership ¶ 2.J.3) (providing that if the Nationals and TCR cannot reach mutually agreeable terms for the rights fee, "the fair market value of the Rights shall be determined by" a committee of MLB).

and an equity interest in the RSN that would televise the games. So the deal struck by MLB, the Orioles, and TCR is unquestionably better for the Nationals than Comcast's proposal.

Finally, the deal that was struck is in the interest of the Nationals' fans because it creates incentives for TCR (and the Orioles) to get Nationals games televised as soon as possible and to the fullest extent possible. Now that Orioles-controlled TCR owns the production and exhibition rights to Nationals games – and has agreed to pay tens of millions of dollars in fees to the Nationals for those rights – the Orioles have every incentive to get Nationals games distributed as widely as possible and in promoting the Nationals' popularity and success. As Peter Angelos stated the day Comcast's meritless lawsuit was dismissed, "now we can get back to the first order of business, which is to get all of the Nationals games to all of the Nationals fans."[32] In short, what Comcast never accurately portrays is that the March 28 Settlement Agreement transformed the Orioles' interests from opposing baseball in Washington, D.C., to having an interest in the success of that franchise. Because it holds the rights to produce and exhibit Nationals games, TCR stands to gain as the Nationals' fan base expands.[33]

4. Comcast's Refusal To Carry TCR's Programming Cannot Be Justified Based Upon Legitimate Business Considerations

Comcast next claims that its decision not to carry TCR is defensible in light of business concerns relating to the strength of TCR's programming schedule, the subscriber fees TCR has supposedly demanded, and the purported difficulty in creating room for Nationals games on Comcast's basic or expanded basic tier. Each of these claims is demonstrably pretextual.

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[32] Ex. 9 (T. Heath, *Judge Dismisses Comcast Lawsuit Against Orioles*, Wash. Post, July 28, 2005, at E09).

[33] It is absurd for *Comcast* to assert that it seeks to defend the rights of the Nationals and of Nationals fans. Comcast's goal has been to maximize its profits. First, it sought to maximize profits by gaining the Nationals' television rights to itself. Having failed in this effort, Comcast has now reversed course and is refusing to televise Nationals games in an attempt to destroy TCR as the owner of those rights. If Comcast were the champion for the Nationals fans it would immediately begin televising Nationals games, rather than seeking to protect its monopoly over regional sports programming.

First, Comcast's refusal to carry TCR's programming cannot be justified based upon Comcast's alleged concern that TCR is not yet a 24 hour-a-day network. As a threshold matter, contrary to Comcast's misleading suggestion, the launch of an RSN with a 24-hour programming schedule already in production depends greatly on how much time it has to get organized prior to its launch. RSNs routinely obtain rights to anchor programs – such as MLB games – and then build a 24-hour schedule around those programs once they have obtained sufficient carriage arrangements.[34] TCR's effort to obtain carriage based on its rights to the Nationals games, in advance of securing other programming to round out its schedule, is accordingly not unusual given how little time it had to prepare for the production of Nationals games, since the March 28 Agreement with MLB was reached only days before the 2005 MLB Season's Opening Day. Indeed, when TCR explained this matter to programming distributors, DirecTV specifically advised TCR that it wanted a "games-only" schedule for 2005 because of other channel issues and programming concerns that it had.[35] TCR has made clear to distributors that it is prepared to negotiate on price and programming issues, but the reality is that Comcast (alone among MVPD distributors) has used MLB's late-in-the-day decision on how to resolve the Nationals' television production rights issues as an excuse for not distributing Nationals games.[36]

Moreover, TCR has made clear its intention to become a round-the-clock network as soon as possible.[37] In a letter to Comcast, TCR expressed its intent to become a 24-hour network on March 1, 2006, unless the MVPDs that carry TCR's programming express a preference for

[34] *See* Ex. 10 (Wyche Decl. ¶¶ 7-8).

[35] *See id.* ¶ 4.

[36] *See id.*

[37] As early as February of 2002, TCR was announcing its plans to convert its network into a 24-hour programming network. *See, e.g.*, Complaint Ex. 13 (N. Kercheval, Daily Rec. Feb. 20, 2002; B. Miller, *Orioles TV Network Ready for 24/7 Sports Coverage*, Daily Rec. June 8, 2002.

TCR to delay its full schedule.[38] TCR has explained that when it becomes an around-the-clock network, it plans to televise the Nationals games,[39] to televise a pre-game and post-game show, to televise edited versions of the game in the overnight hours and again in the mornings, to televise sports news and sports talk programming, and to purchase available live sporting events of interest to the Mid-Atlantic television viewing public. Put simply, TCR has committed to developing an RSN with programming comparable to the programming lineups of other RSNs.[40]

Indeed, none of the MVPDs approached by TCR – including Comcast[41] – expressed any significant concern about the "games only" approach for the 2005 baseball season.

And, even if Comcast might *prefer* full-time programming now, a games-only approach this season is nonetheless deserving of carriage. The major draws for viewers (and by extension advertisers and MVPDs) for RSNs are the live broadcasts of sporting events – in TCR's case, the Nationals games. These events regularly gain the largest ratings for RSNs; in some circumstances they gain a larger share of viewers (at least among some demographics) than all other competing programs aired at the same time.[42] These live broadcasts are the reason that the

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[38] *See* Complaint Ex. 35 (Letter dated June 9, 2005 from D. Gluck to M. Bond) ("June 9 Letter"). TCR has made numerous similar assurances publicly. *See, e.g.*, Ex. 11 (C. Walker, *Orioles, Comcast Spat Hurts the Fans; Analysts Predict Accord on Regional Cable Network*, The Baltimore Sun , June 16, 2005, at 1D; DIRECTV: Headlines, *DIRECTV is New Home For the Washington Nationals; MidAtlantic Sports Network and DIRECTV Reach Multi-Year Carriage Agreement for Carriage of Nationals Games* (Apr. 29, 2005)).

[39] TCR has also explained that once its right to televise Orioles games has been established, it will televise these games as well. *See* Complaint Ex. 35 (June 9 Letter).

[40] *See, e.g.*, Complaint Ex. 29 (DirecTV Washington – Washington – Lineup and RCN Cable Starpower – Washington – Lineup for June 8-14, 2005) ("CSN Lineups"); Ex. 12 (NESN Program Listings For July 21, 2005). In footnote 80 to its Answer, Comcast asserts that TCR's inclusion of "infomercials" on its network is yet a further reason for an MVPD to refuse carriage. Answer ¶ 42 n.80. Comcast fails to note that all RSNs, including CSN, include substantial paid programming in their lineup. *See, e.g.*, Complaint Ex. 29 (CSN Lineups); Ex. 12 (NESN Program Listings). Comcast does not, because it cannot, allege that TCR intends to include a greater proportion of infomercials than other RSNs.

[41] Comcast did not raise this issue until *after* TCR's counsel informed Comcast of its intent to bring this Complaint, when it was plainly girding itself for legal action. *See* Complaint Ex. 34 (Letter dated June 7, 2005 from M. Bond to D. Gluck ("June 7 Letter")).

[42] Ex. 13 (*Red Sox-Angels Game Nets Largest Rating in NESN History*, Boston Business Journal, Sept. 2, 2004 ("The Sept. 1 Boston Red Sox-Anaheim Angels baseball game earned the highest household rating for any

RSNs exist. Thus, TCR's "games only" approach for the remainder of this season would provide Comcast with the most valuable programming that TCR will provide, while allowing Comcast an opportunity to address any potential problems it might face allocating a full-time channel to TCR.

Indeed, Comcast's own practices demonstrate that, its representations to this Commission notwithstanding, it is not especially concerned with a games-only approach. Comcast routinely carries various sports packages, including MLB Extra Innings, ESPN GamePlan, and NBA League Pass, in which channels are activated solely to televise single games with no programming at other times.[43] Comcast's willingness to carry these sports packages puts the lie to its assertion that its decision not to carry TCR was based upon the lack of round-the-clock programming.[44]

Second, Comcast's claim that it has refused to carry TCR based on the cost of offering the service is likewise untrue. Comcast never raised this as an issue until after TCR notified Comcast of its intent to file this Complaint. TCR first provided a term sheet to Comcast on April

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event in the 20-year history of regional TV network New England Sports Network, officials said. . . . The five highest ratings at the station previously had been New York Yankees games, according to NESN officials."); P. Gammons, *The Anaheim A's? It's Possible: Attendance, TV Ratings and Contraction*, ESPN.com (June 9, 2001) ("Red Sox claim that one Yankees game on their cable outlet NESN was the highest-rated program in the Boston market that night and that NESN and over-the-air ratings are off the charts."); YES Network News: The YES Network, *YES Yankees Telecasts Rank # 1 in Primetime* (July 21, 2005) ("New York Yankees telecasts on YES Network, the most-watched regional sports network in the United States, have ranked #1 in men 18+ in primetime in New York* for four consecutive game nights, according to Nielsen Media Research. In addition, YES has enjoyed some of its highest-rated Yankees telecasts over the past week."); M. Kempner, *Turner South: Young Executive Grows Up Along With Cable Network*, Atlanta J. & Const., Oct. 14, 2000, at 1C ("Turner South currently uses all three of its sports franchises as bait to draw viewers and cable operators. Braves games are the network's highest-rated programming and provide a substantial share of Turner South's ad revenue, according to Mansell of Paul Kagan Associates.")).

[43] *See* Ex. 14 (Comcast Sports Channel Listing, *available at* http://www.comcast.com/Benefits /CableDetails/Slot2PageOne.asp; MLB Extra Innings 2005, Comcast August Line Up, *available at* http://www.indemand.com /sports/mlb2005/schedule/schedule.jsp).

[44] Comcast's assertion that it wants a fully developed line up is likewise belied by the lineup of its own RSN. CSN regularly shows long blocks of paid programming – presumably because CSN does not have sufficient sports programming to fill the day. *See, e.g.*, Complaint Ex. 29 (CSN Lineups).

13, 2005, and met with Comcast officials on April 14.[45] Comcast never sought to negotiate with TCR about these terms.[46] On May 13, 2005, TCR sent an updated term sheet to Comcast, which included the terms that would apply if Comcast were able to block TCR from producing and televising Orioles games beginning in the 2007 season.[47] Only after TCR sent a further follow-up letter and after TCR's attorney sent a letter to Comcast notifying it of TCR's intent to file a complaint with this Commission,[48] did Comcast even respond to TCR's proposal. At that time, Comcast addressed a single letter to TCR making various inquiries and asserting that the carriage decision was complicated by, among other things, "the substantial per-subscriber fees sought by MASN."[49] But Comcast never engaged in serious negotiations with TCR and certainly never attempted to negotiate a lower per-subscriber fee for TCR's programming.[50]

In fact, Comcast has never responded to TCR's suggestion that Comcast begin carrying Nationals games immediately and to work out the terms of the carriage later through an independent arbitration.[51] In the letter notifying Comcast of TCR's intent to file a complaint with this Commission, TCR's counsel explained: "TCR urges Comcast to begin carrying Nationals games immediately. If need be, the financial terms of that distribution can be decided

[45] Complaint Ex. 21 (Mid-Atlantic Sports Network Affiliate Term Sheet for Comcast) ("April 13 Term Sheet"); Ex. 21 (Foss Supp. Decl. ¶ 4).

[46] As TCR has previously noted, Comcast's response to this Term Sheet was to send letters to other MVPDs threatening legal action if they agreed to carry TCR's programming. *See* Complaint ¶¶ 57-60.

[47] *See generally* Complaint Ex. 28 (Term Sheet For Carriage of Mid-Atlantic Sports Network ("MASN") Between TCR Sports Broadcasting Holdings, L.L.P. ("TCR"), dba MASN and Comcast Corporation ("Comcast")) ("May 13 Term Sheet").

[48] *See* Complaint Ex. 33 (Letter dated May 23, 2005 from D. Gluck to M. Bond); Complaint Ex. 2 (Letter dated May 27, 2005 from M. Kellogg to B. Roberts) ("May 27 Notice of Intent").

[49] Complaint Ex. 34 (June 7 Letter).

[50] Ex. 21 (Foss Supp. Decl. ¶¶ 4-7).

[51] *Id.* (Foss Supp. Decl. ¶ 7).

in due course by an independent arbitrator."[52] Although Comcast's counsel responded to that letter, he did not address TCR's suggestion that the terms of carriage could be worked out by an arbitrator.[53] Comcast's failure to raise price as a factor in the negotiations and its refusal to submit to arbitration undermines any suggestion that Comcast's decision was based on price – or any specific terms of carriage.

Comcast's complaints about cost are further undermined by the fact that TCR's proposed fee structure is comparable to the fees charged by other RSNs. According to one industry source, "regional sports network fees – paid by the cable and satellite companies – are generally between $1.60 and $2.50 per subscriber per month."[54] TCR's proposed fees fall within – if not below – this range. For example, in the term sheet forwarded to Comcast on May 13, 2005, TCR proposed rates ranging from $.03 to $1.42 per subscriber per month if TCR had been unable to vindicate its rights to televise Orioles games.[55] For programming that included both Orioles and Nationals games, TCR proposed $.61 to $2.50 per subscriber.[56] TCR's proposed rates are thus comfortably within the range of rates charged by other RSNs for their services, thus refuting Comcast's assertion that cost was the impediment to carriage.

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[52] Complaint Ex. 2 (May 27 Notice of Intent). TCR has taken a consistent position in its Complaint to the Commission, requesting that the Commission "order Comcast to provide carriage on all Comcast systems under the same terms and conditions that TCR has received from other multichannel video programming distributors, *or such other terms and conditions as the Commission shall deem just and reasonable, or such other terms and conditions as shall be established through binding independent arbitration*." Complaint at 33 (emphasis added). TCR is not requesting any set price for its service; it is open to accepting carriage under the terms considered appropriate by an independent third party, be it this Commission or an arbitrator.

[53] *See* Complaint Ex. 3 (Letter dated June 3, 2005 from J. Schmidtlein to M. Kellogg).

[54] Ex. 15 (C. Swett and J. Freedom du Lac, *Kings Reach Out to Valley: Comcast TV Deal Sets the Stage for Acquiring New Fans in One of the Fastest-growing Regions of the State*, Sacramento Bee, Sept. 13, 2004, at A1). Numerous other sources contain estimates ranging from $1.20 per subscriber to more than $2.00 per subscriber. *See, e.g.*, Ex. 16 (T. Hazlett, *Yes, No Yanks*, N.Y. Post, Aug. 3, 2002; R. Sandomir, *Cable Dispute Over Mets Is Settled*, N.Y. Times, May 10, 2005, at D2; R. Sandomir, *Mets' Cable Channel Will Make 2006 Debut*, N.Y. Times, Oct. 13, 2004, at D4; A. Pergament, *Was Empire's Demise Necessary?*, Buffalo News, Jan. 22, 2005, at B4; F. Ahrens, *Area Baseball Network Must Form Quickly, Giant Comcast Likely to Have Significant Say in Expos-Orioles Channel*, Wash. Post, Sept. 30, 2004, at A14).

[55] *See* Complaint Ex. 28 (May 13 Term Sheet at 2).

[56] *See id*. at 3.

Indeed, Comcast's refusal to agree to TCR's proposed rates is particularly striking when compared to Comcast's treatment of its affiliated RSN in Chicago, Comcast SportsNet Chicago ("CSN Chicago"). CSN Chicago has faced considerable difficulty gaining carriage on other MVPDs because it has attempted to charge considerably more than TCR, or virtually any other RSN – $3.00 per subscriber per month.[57] Comcast, of course, has been more than willing to carry CSN Chicago in spite of its high fee.[58] Yet, even when TCR offers both Orioles and Nationals games – including an extra channel that will be used to show conflicting games – TCR's maximum current fee is $2.50 per subscriber per month, a fee that Comcast maintains is too high.

Third, there is no basis – other than the bald assertion in the Answer – to Comcast's claim that its refusal to carry TCR is based on the purported need to avoid bumping other channels from the channel lineup. Again, Comcast never expressed this concern to TCR prior to the commencement of this proceeding, which itself demonstrates that the excuse for non-distribution is pretextual.[59] Because Comcast never brought this so-called concern to TCR's attention, moreover, Comcast and TCR never discussed whether this term was negotiable, including, for example, whether TCR was willing to negotiate different terms during TCR's games-only format.

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[57] *See* Ex. 17 (R. Thomas Umstead, *Taking Their Best TV Shots; Several Teams Are Shunting Aside the Network* '*Middlemen*', Multichannel News, Aug. 9, 2004, at 11) ("Indeed, a network that offers more than one pro sports team in a market has considerably more leverage than a single-team network. But when you feature four sports teams as well as the market's biggest MSO – as is the case for Comcast SportsNet Chicago – carriage is practically a slam dunk. However, the network has yet to reach other carriage deals beyond its MSO owner. Comcast SportsNet Chicago senior vice president and general manager Jim Corno would not reveal the rate card for the network, but sources say the service's $3.00 license fee is among the highest in the country.").

[58] *See id.*

[59] *See*, *e.g.*, Complaint Ex. 34 (June 7 Letter) (setting forth various reasons why the decision whether to carry TCR's programming was complicated without listing the need to bump other channels); Ex. 21 (Foss Supp. Decl. ¶¶ 3-5).

In any case, TCR's request that TCR programming be included in Comcast's basic or extended basic service tier is hardly unusual. As the Commission has recognized, RSNs are typically carried on either the basic or extended basic tiers: "in response to sports channels carried in the DBS basic package, virtually all cable systems have migrated their regional sports networks from premium service tiers to basic and CPS tiers."[60] Indeed, Comcast itself has noted this trend: "Comcast notes that within the past few years, almost all regional sports networks have migrated from premium tiers (at $8 - $14 per month) to the basic cable package. Comcast further states that while this migration has likely contributed to the increase in the price of the basic cable package for subscribers, these tier migrations have generally met with customer approval."[61]

Moreover, Comcast, like any other MVPD, routinely adjusts its channel lineup to accommodate new programming. As Comcast itself noted, "[i]n a typical market, Comcast makes available over 250 channels of video programming," even though it owns or has an interest in only 20 networks nationwide.[62] The sheer volume of channels requires Comcast to make decisions about adding, deleting, and moving channels on a regular basis. In fact, in almost every market, Comcast repeatedly has reorganized its channel offerings, shuffling various networks between its basic and extended basic service.

Thus, for example, Comcast has moved a number of its affiliated networks to subscription tiers with broader viewer bases, thereby displacing other programming. "In L.A., for example, Comcast moved Comcast-owned networks Style, TV One, Outdoor Life, AZN and

[60] Fourth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, ¶ 43 (1998). The Commission noted that over 4,000 MVPDs carried RSNs as part of their basic or expanded basic service tiers, while only 41 MVPDs carried RSNs as a premium service. *See id.*

[61] Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, ¶ 25 (1998).

[62] Answer ¶ 30.

G4 from digital to expanded basic in advance of the market's pending system swap with Time Warner Cable."[63] In Illinois, Comcast recently moved three of its affiliated channels – Comcast Network, The Golf Channel, and Outdoor Life – to more broadly available service tiers (either from Digital service to Expanded Basic service or from Expanded Basic to Basic service).[64] These Comcast-affiliated networks were the only channels that were moved to more broadly available service tiers, and at least one non-affiliated network, EWTN, was moved from Basic to Expanded Basic service.[65] And Comcast already has announced plans to launch the new RSN that will televise New York Mets baseball programming – a network in which Comcast owns an equity interest – on its Expanded Basic service.[66] In short, based on its past representations to the Commission, its willingness to shuffle channel lineups generally, and its announced plans for the Mets RSN, it is clear that Comcast has broad discretion to shuffle its channel lineup; it simply is unwilling to do so for TCR, an unaffiliated RSN that poses a direct threat to Comcast's hegemony in the Baltimore-Washington region.

At bottom, Comcast's objections about channel space are of a piece with its newfound complaints about price and programming format. MVPDs do not make a practice of allowing basic and extended basic channels to lie fallow, on the off-chance that a new, 24-hour network will spring up at a bargain-basement price. Rather, in the ordinary course, MVPDs identify new, attractive programming, negotiate mutually agreeable terms of carriage, and shuffle channel lineups to create the necessary space. The Commission's rules are designed to ensure that, when

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[63] Ex. 18 (S. Brady, *Are Independents' Days Over?*, CableWorld, June 20, 2005).

[64] *See* Ex. 19 (Comcast Notice of Channel Line-Up Changes, effective Feb. 26, 2004, *available at* http://www.warrenville.il.us/channelchanges.pdf).

[65] *See id.*

[66] *See* Ex. 20 (B. Raissman, *YES! Mets Get Own Network Time Warner, Comcast in Deal*, N.Y. Daily News, Oct. 13, 2004, at 70) ("The new regional network, not yet named, will carry up to 125 Mets games along with Mets-related shows and other sports programming. . . . For Time Warner's 2.3 million local subscribers and Comcast's 790,000 subscribers, the Mets network will be available on expanded basic cable.").

that new, attractive programming competes with affiliated content, the MVPD nonetheless negotiates in good faith and refrains from discriminating on the basis of nonaffiliation. Yet that is precisely what Comcast did here – it has refused to negotiate meaningfully for carriage of TCR *at all*, in the hopes that it would force TCR to surrender its rights and thus permit CSN to continue unchallenged as the only RSN "[]necessary" in the Baltimore-Washington area.[67]

B. Comcast's Refusal To Carry TCR's Programming Unreasonably Restricts TCR's Ability To Compete

Comcast next contends that, even assuming it discriminated against TCR on the basis of nonaffiliation, such discrimination does not run afoul of the Commission's rules. That is so, the theory goes, because Comcast has insufficient market power for its conduct to harm competition.[68]

That is nonsense. This Commission has long recognized that "[s]tart-up video programmers need to reach a critical level of subscribership quickly in order to achieve long-term financial viability."[69] For that reason, "in a highly concentrated market," a single cable incumbent, provided it is large enough, has the power to "determine the success or failure of a programming network, an outcome Congress sought to prevent."[70] Indeed, depending on the circumstances, "[t]he market power" of a large cable operator "has the potential to prevent nascent cable networks from *even launching*," thereby squelching the availability of valuable

[67] Complaint Ex. 24 (Letter dated April 21, 2005, from D. Cohen to various members of Congress).

[68] *See* Answer ¶¶ 48-54.

[69] *AT&T/MediaOne Order* ¶ 51.

[70] *1992 Act FNPRM* ¶ 28; *see also* Complaint Ex. 9 (Eleventh Annual Report ¶ 145) ("Our examination of vertical integration in the MVPD industry focuses on ownership affiliations between video programming distributors and video programming suppliers. These vertical relationships . . . may deter competitive entry in the video marketplace and/or limit the diversity of programming."); *AT&T/Comcast Order* ¶ 36 ("Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.").

programming content and entrenching the cable operator's own vertically integrated operations.[71]

If that is true anywhere, it is true here. Comcast is the dominant MVPD in the markets TCR seeks to reach.[72] In TCR's two key target markets – Baltimore and Washington, D.C. – Comcast's network already passes approximately 1.8 million households[73] and serves more than 1.3 million subscribers.[74] That 1.3 million subscriber figure constitutes approximately *two-thirds* of all cable subscribers in the region, and approximately half of all MVPD subscribers.[75] And that is only the beginning. As detailed elsewhere,[76] Comcast has sought this Commission's approval to obtain assets from Adelphia that would push its share of the Baltimore and Washington markets to *80 percent* of cable subscribers and 60 percent of total MVPD subscribers.[77]

TCR's viability as an RSN thus rests on its ability to obtain distribution from Comcast on commercially reasonable terms. Comcast already controls access to more than half of the

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[71] Third Report and Order, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19098, ¶ 56 (1999) (emphasis added); *see AT&T/Comcast Order* ¶ 58 (a cable operator with "affiliated programming from which it could benefit by the reduction in programming competition" has "the economic incentive and ability to foreclose unaffiliated regional programming").

[72] *See supra* p. 2; Complaint ¶ 11.

[73] *See* Media Business Corp., *Cable Homes Passed by DMA* (July 2005).

[74] *See* June 21, 2005 Supplemental Time Warner Data; *see also* Media Business Corp., *Basic Cable and Digital Cable Subscribers by DMA – 1st Quarter* 2005 (June 2005) (estimating 1.5 million subscribers).

[75] *See* Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005* & *Basic and Digital Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005); June 21, 2005 Supplemental Time Warner Data. Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

[76] *See generally* TCR Petition.

[77] June 21, 2005 Supplemental Time Warner Data; Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants. The Adelphia deal will also extend Comcast's reach to approximately 60-66 percent of all homes within that territory. *See* Media Business Corp., *Cable Homes Passed by DMA* (July 2005); Nielsen Media Research, *U.S. Television Household Estimates* (Sept. 2004). The lower range of the estimate is based on a denominator of U.S. Postal Service households estimated by Media Business Corp.; the higher range of the estimate is based on a denominator of households by DMA as reported by Nielsen Media.

MVPD subscribers in what is by far TCR's most promising markets; it is seeking approval to extend that control even further through its acquisition of Adelphia assets; and it is steadfastly refusing even to engage in meaningful negotiations for the carriage of TCR to protect its affiliated RSN. The suggestion that this blatantly anticompetitive behavior will not in fact harm competition – by threatening TCR's ability to survive and compete with CSN – should be rejected out of hand. According to TCR's internal calculations, its ability to remain a viable independent RSN will be "significantly and adversely affected" if it is unable to obtain a carriage agreement with Comcast.[78]

Nor is the analysis different if the relevant market is considered to be the Orioles' and Nationals' entire shared television territory. The core of that market is dominated by Comcast. So even if Comcast had not prevented TCR from securing carriage in much of this territory through its campaign of threats and intimidation and TCR had been able to secure carriage on *all* MVPDs other than Comcast, Comcast's own refusal to distribute TCR's programming would cripple TCR because of Comcast's stranglehold on the Baltimore-Washington area. Again, that area is TCR's prime target; without access to the vast majority of subscribers there, TCR's chances of success are severely inhibited, irrespective of TCR's ability to gain carriage elsewhere.[79]

In any case, even considering the region as a whole, Comcast has a shared (or dominant) presence in all of Washington, D.C., 19 of 23 counties in Maryland (and independent Baltimore City), and 15 of 95 counties in Virginia (and five of 39 independent cities), as well as all three of the counties in Delaware and eight of the nine Pennsylvania counties that fall within the Orioles'

[78] *See* Ex. 21 (Foss Supp. Decl. ¶ 8).

[79] *See id.*

television territory.[80] When measured against the volume of subscribers needed for TCR to be viable, what is left over – once Comcast has removed itself from the mix – plainly affects TCR's ability to maintain viability as an unaffiliated RSN.[81]

Comcast's primary response is that its market power should be measured not by its share of cable or MVPD subscribers, but rather by its share of all "TV households," and that, when so measured, it does not possess market power.[82] But the Commission has consistently, and properly, refused to define the market in that manner. As the Commission has explained, "a cable operator's purchasing power should be measured in terms of the percentage of *all MVPD subscribers* that it serves."[83] Comcast's discussion of the total "TV households" it reaches is accordingly beside the point.

In any case, Comcast concedes that, even by its own flawed metric, it controls 40% of the market in Baltimore and 32% in Washington D.C.[84] Comcast's theory thus appears to be that MVPDs that control more than a third of all TV households – whether defined regionally or nationally – have a green light to engage in discrimination on the basis of nonaffiliation. That is not the law. On the contrary, the Commission has in the past forced divestitures to ensure that a single cable operator controls fewer than 30% of the nation's MVPD subscribers, even as it assumed that its carriage rules – including the nondiscrimination rule at issue here – would continue to apply.[85] As the Commission has explained, its carriage rules "are complements [to] rather than substitutes for" the concerns that arise when cable providers such as Comcast amass

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[80] *See* Engineering Div., Media Bureau, FCC, *Communities Registered with the FCC as of January 13, 2005*, *available at* http://www.fcc.gov/mb/engineering/liststate.html.

[81] Ex. 21 (Foss Supp. Decl. ¶ 8).

[82] *See* Answer ¶ 49.

[83] *AT&T/MediaOne Order* ¶ 51 (emphasis added).

[84] *See* Answer ¶ 49.

[85] *See, e.g., AT&T/Media One Order* ¶¶ 59, 63.

an undue volume of subscribers in a given market.[86] That same analysis applies here and forecloses Comcast's contention that, because it supposedly controls a "mere" one-third of the so-called market of "TV households," its discrimination on the basis of nonaffiliation raises no competitive concerns.

Comcast's reliance on alternative distribution outlets, such as DirecTV and over-the-air networks, fails for the same reason.[87] While important, TCR's ability to gain carriage elsewhere is only one small piece of the puzzle. The largest piece, by far, is Comcast. Comcast plainly recognizes that fact, and is refusing to provide carriage precisely because it knows that doing so threatens TCR's survival. In view of its dominant position in the market, absent action by this Commission, it may well succeed.[88]

Indeed, if there were any doubt about Comcast's ability to foreclose competition through its control of regional sports programming, it is put to rest by Comcast's behavior in Philadelphia, where Comcast has used its position as the dominant cable provider to maintain the dominance of its RSN, which in turn has permitted it to foreclose competition from competing MVPDs. In brief, Comcast's RSN in Philadelphia, SportsNet, has the production and exhibition telecasting rights for the Philadelphia Flyers, Philadelphia 76ers, and Philadelphia Phillies,[89] and Comcast has refused to offer that programming to any DBS operators.[90] The effect on competition has been staggering. In the Philadelphia area, DBS subscription rates are *less than half* the national average.[91] At the same time, the lack of any meaningful competition from DBS

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[86] *Id.* ¶ 63.

[87] *See* Answer ¶¶ 50-51, 54.

[88] Ex. 21 (Foss Supp. Decl. ¶ 8).

[89] *DIRECTV/COMCAST Order* ¶ 27.

[90] *See id.* ¶ 10.

[91] *See* Jonathan M. Orszag et al., *An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers* 22-23 (Jan. 2002) (Exhibit 1 to Reply Comments of

or alternate cable providers has foreclosed independent RSNs from gaining a foothold in the Philadelphia market without Comcast's blessing. Comcast has thus achieved dominance both as a cable provider *and* as an RSN, to the detriment of competition and consumers.

As TCR has explained elsewhere,[92] Comcast is apparently intent on pursuing the same course here. In fact, Comcast's acquisition of Adelphia is similar to the asset swaps and acquisitions that allowed Comcast to deny competing MVPDs the right to carry its RSN in the Philadelphia market.[93] By consolidating its power in the Baltimore-Washington region – and by creating a larger contiguous service area that will permit it to transmit programming without the use of satellite – Comcast is positioning itself so that it will be exempt from the program access rules and thus enable it to refuse to license its affiliated content, including most importantly CSN, to competing MVPDs.[94] And, for its part, CSN already owns the rights to televise Washington Wizards games, Washington Capital games, and Baltimore Orioles games (through the 2006 MLB season). All that remains is for Comcast to kill off the nascent RSN competition that TCR represents by preventing it from reaching the vast majority of subscribers in its target area. This Commission can and should prevent that result, by forcing Comcast to cease its unlawful refusal to carry TCR on the basis of nonaffiliation.

EchoStar Satellite Corp., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290 (FCC filed Jan. 7, 2002)).

[92] *See* TCR Petition at 16-18.

[93] *See* Declaration of J. Gregory Sidak and Hal J. Singer (Attachment 1 to Adelphia Comments) ¶¶ 46-47 (explaining that Comcast maintained its stranglehold on the Philadelphia market by engaging in swaps and acquiring cable companies so as to avoid the Commission's program access rules).

[94] *See* TCR Petition at 16-18.

II. COMCAST IMPROPERLY DEMANDED AN EQUITY INTEREST IN THE NETWORK THAT WOULD CARRY NATIONALS GAMES AS A CONDITION OF CARRIAGE IN VIOLATION OF THE COMMISSION'S RULES

The Commission's rules promulgated pursuant to the 1992 Cable Act provide that "[n]o cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems." 47 C.F.R. § 76.1301(a). Comcast has violated this rule by (1) conveying just such a demand through an intermediary and (2) subsequently refusing to negotiate in good faith with TCR regarding the carriage of TCR's regional sports programming. Comcast's claims to the contrary are simply an attempt to evade liability for its improper actions and should be rejected.

Comcast argues that it is not liable for the improper equity demands made on its behalf by Stephen Greenberg, an investment banker with Allen & Company on three grounds: (1) Comcast could not have improperly sought an equity interest during the negotiations between the Orioles, TCR, and MLB because TCR was not an RSN until March 28, 2005; (2) Greenberg was not Comcast's agent and therefore could not have conveyed Comcast's demand for an equity interest as a condition of carriage; and (3) any demand for equity was in any event appropriate under the Commission's rules.

Those arguments have no merit. First, Comcast is simply wrong in saying TCR was not an RSN until March 28, 2005, and Comcast's demands for an equity interest in a proposed two-team RSN that were conveyed before the assignment of the Nationals' telecast rights to TCR are squarely within the prohibition contained in the Commission's rule. Second, although the legal status of Greenberg's role cannot definitely be resolved without further factual development, it is ultimately beside the point. The key point, which Comcast does not rebut, is that Greenberg accurately conveyed Comcast's demand for an equity interest. And Comcast's subsequent

refusal to carry a network (TCR) in which it holds no equity interest is perfectly consistent with the demand it made in negotiations spanning from late 2004 to early 2005. Third, Comcast's argument in defense of its equity demand – which depends on the assertion that Comcast intended to swap CSN's equity for an interest in a new multi-team RSN – has no factual support: in fact, Comcast demanded an equity interest in a two-team network to which it would contribute no significant equity of its own.

A. Comcast's Demand for an Equity Interest Cannot Be Excused Merely Because It Was Made Before TCR Obtained the Rights To Produce and Televise Nationals Games

The argument that any demands for equity made by Comcast are not actionable under the Commission's rules simply because the demands were made prior to the finalization of the agreement between the Orioles, TCR, and MLB, is incorrect. As set out in some detail in the Complaint – allegations that Comcast never challenges – Greenberg repeatedly informed Orioles officials that Comcast would not distribute a two-team network including Nationals games *unless* it was given a minimum of a 50% equity interest.[95] Specifically, *prior* to the announcement, in mid-September 2004, of the Expos' relocation, Greenberg stated that any RSN carrying the Orioles and Nationals games would be required to provide Comcast with an equity stake in the network to obtain carriage on Comcast's cable systems.[96] Then, *following* the announcement of the relocation, Greenberg presented a series of proposals regarding the establishment of a regional sports network, all of which included an equity stake for Comcast ranging from 50-67%.[97] Moreover, in those subsequent meetings and conference calls, Greenberg stated that the

[95] *See* Complaint ¶¶ 25-26, 31-32, 34-37; *id*. Ex. 4 (Foss Affidavit ¶¶ 10-11, 13-16).

[96] *See id* Complaint Ex. 4 (Foss Affidavit ¶¶ 10-11) (noting that Orioles representatives attended a summer 2004 meeting where the prospect of a two-team regional sports network was broached by Greenberg and that in subsequent discussions, Greenberg told the Orioles that "the only way [the Orioles and Nationals] would get carriage by Comcast would be to allow Comcast to have an equity interest in the regional sports network").

[97] *See id.* ¶¶ 34-37; *id* Ex. 4 (Foss Affidavit ¶¶ 12-16).

Orioles "would be lucky" if Comcast agreed to accept *as little as* a 50% equity stake in such a network as a condition of carriage and that TCR had no choice but to do business with Comcast and could not avoid granting Comcast an equity interest in such a regional sports network.[98] As discussed below, based on these statements and the manner in which they were conveyed, TCR and the Orioles understood Greenberg to be conveying Comcast's demand.[99] Such communications from Greenberg continued until early 2005. Comcast subsequently followed through on its threat: when MLB and the Orioles reached a settlement agreement that conferred the production and exhibition rights to Nationals games on TCR, without any equity interest for Comcast, Comcast refused to distribute that programming.

All of the statements made by Greenberg were made in the context of detailed discussions between the Orioles, TCR, and MLB regarding the Nationals' pending move to Washington and the potential use of a two-team regional sports network to exhibit the Orioles and Nationals games.[100] Comcast was aware of these discussions and, in fact, was itself negotiating for the right to carry Nationals games on its wholly-owned regional sports network, CSN.[101] The demands made by Comcast were thus aimed at requiring a substantial measure of equity in exchange for Comcast's carriage of the competing network – the very thing that the Commission's rules prohibit.

Comcast responds by attacking straw men that are irrelevant to TCR's allegations. First, Comcast argues that it never sought an equity interest in TCR.[102] This argument, however, is irrelevant because TCR does not allege that Comcast demanded an equity interest in TCR per se,

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[98] *Id* ¶¶ 35-36.

[99] *Id*.

[100] *See id*. ¶¶ 22, 39.

[101] *Id*. ¶¶ 23-24.

[102] *See* Answer ¶¶ 11, 14.

but rather that Comcast made (and has carried out) its threat not to carry *Nationals* games unless it received equity in the network that produces and exhibits those games.[103] Similarly, Comcast claims that it could not have demanded an equity interest in "MASN" during the negotiations that culminated in an agreement to grant the exclusive rights to produce and exhibit Orioles and Nationals games to TCR (operating under the trade name MASN), because, at the time the negotiations were taking place, "MASN" did not "exist" in its present form – that is, as an RSN producing baseball games for pay television broadcast. But that argument is likewise irrelevant to the Complaint's allegations, because of the fact that Comcast demanded equity in *any* network that would exhibit Orioles and Nationals games as a condition of carriage is, in and of itself, sufficient to establish liability under the Commission's rules prohibiting such a demand.[104]

Furthermore, the argument made by Comcast misstates the facts. MASN is not a separate entity, but rather is simply a trade name for TCR.[105] The basic principle relied upon by Comcast – namely, that MASN "came into existence" only after the negotiations were complete in March 2005 and that any demand for equity could therefore only have taken place after March 2005 – is thus factually incorrect.

In all events, Comcast's claim that it would be impossible for Comcast to demand equity in the network that would carry Orioles and Nationals games until after programming rights were

[103] Comcast's statements in its answer and attached declarations that it did not *directly* demand an equity interest in TCR are also irrelevant. *See* Answer ¶ 13, Bond Decl. ¶ 11. TCR's claim is – and always has been – that Comcast's demands were conveyed through Greenberg, in his capacity as a managing director of Allen & Company *See, e.g.*, Complaint ¶¶ 26, 30, 35-36.

[104] *See, e.g.*, Complaint Ex. 26 (May 13 Letter); Complaint ¶¶ 2, 42. Comcast's attempt to make TCR, doing business as MASN, into a new entity is factually wrong and was rejected as such by Judge Thompson of Montgomery County circuit court. As Comcast well knows – because it signed a contract with TCR in 2001 for a one-year license to produce and exhibit Orioles games for over-the-air television – TCR has been operating as an RSN since its over-the-air production licensing agreement with CSN expired in 2001. At that time, TCR made clear to Comcast and CSN that, upon the expiration of the parties' agreement for certain Orioles pay television games after the 2006 season, TCR would simply retain those rights for itself and produce those games for over-the-air *and* pay television. Thus, for Comcast to call TCR (doing business as MASN) a "new" RSN is a deliberate falsehood.

[105] Answer ¶ 11. TCR used to be known as "Orioles Baseball Network," but of course had to change its name when it obtained the production and exhibition rights to Nationals games as well.

assigned to the network is inconsistent with the language and spirit of the Commission's rules. The rules prohibit any MVPD from demanding "a financial interest in any program service as a condition for carriage." 47 C.F.R. § 76.1301(a). There is no safe-harbor for demands that occur during the formative stages of a network or during negotiations over assignment of broadcast rights. Here, Comcast's demand was made at the very time when TCR was negotiating for the right to telecast Nationals games and it was made with the apparent intent of preventing the assignment of those rights to CSN's competitor rather than to CSN itself. Such a demand goes to the heart of the concern underlying the statute and the Commission's rule: preventing an established MVPD from using its market power to stifle the development of a competing network.[106]

B. Comcast's Misguided Arguments About Agency Do Not Alter the Fact that Comcast Demanded an Equity Interest In the Network that Would Carry the Nationals Games

Comcast also argues that Greenberg could not have conveyed Comcast's demand for an equity interest as a condition of carriage because he was not Comcast's agent with respect to the negotiations over the Nationals television rights.[107] But Comcast's carefully qualified arguments fail to rebut the central point – that Greenberg, agent or not, accurately conveyed Comcast's demand for an equity interest in any two-team RSN as a condition for carriage. In all events, TCR had good reason to draw the conclusion that Greenberg was acting as Comcast's agent, and, at a minimum, the question of communications between Comcast and Greenberg during the critical period between September 2004 and March 2005 warrants discovery.

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[106] *See* Second Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642, ¶ 1 (1993) ("*Program Carriage Order*") (noting that the purpose of the Cable Act is to "prevent cable systems . . . from taking undue advantage of programming vendors through various practices, including coercing vendors to grant ownership interests . . . in exchange for carriage on their systems").

[107] *See* Answer ¶¶ 14-20.

Comcast devotes considerable energy to rebutting the allegations, made by TCR on information and belief, that Greenberg was acting as Comcast's agent in negotiations between the Orioles and TCR and MLB. But Comcast does not deny that Greenberg did in fact communicate to TCR that Comcast would settle for nothing less than a 50% interest in an RSN that owned Orioles and Nationals production and exhibition rights. Furthermore, while Allen & Co.'s lawyers assert that "[a]s of September, 2004, neither [Greenberg] nor anyone else at Allen had ever discussed the concept of a new Washington RSN with Comcast,"[108] they offer nothing to contradict the conclusion that, during the critical period of negotiations *following* the September 16, 2004, announcement that the Expos would be moving to Washington, Greenberg *did* confer with Comcast and was accurately conveying Comcast's position in his subsequent conversations with the Orioles and TCR.[109] Indeed, that appears to be precisely the negative implication of the lawyers' carefully crafted letter.

It is Comcast's demand – not whether it was conveyed by an agent or a non-agent intermediary – that matters for purposes of this Complaint. Greenberg was extremely specific in proposing ownership structures for an RSN with rights to Nationals' games, and clearly stated – in conversations with the Orioles that took place *after* September 2004, that "Comcast would not do a deal with the Orioles without a substantial equity interest."[110] Notably, Comcast does not deny that, in making these statements, Greenberg was accurately conveying Comcast's position. Instead, Comcast suggests that "it would have made no sense" for Comcast to communicate this position when "Comcast was making its own proposal to MLB between September 2004 and

[108] *See* Letter dated July 11, 2005 from R. Zaragosa to Commission Chairman K. Martin ("Zaragosa Letter").

[109] *See* Complaint ¶¶ 36, 37.

[110] *Id.* ¶ 37.

March 2005 about TV rights to the Nationals' games."[111] But there is nothing nonsensical about Comcast seeking Nationals' telecast rights for its own affiliate, CSN, while communicating as well its intention to deny carriage to any network that won the rights unless Comcast had an ownership interest. Both points are consistent with Comcast's overall strategy of ensuring that the Nationals' telecast rights would not be controlled by an unaffiliated competitor.

The Commission should, at a minimum, authorize discovery to get to the bottom of any communications between Greenberg and Comcast during the critical period before March 2005. Comcast's denial of an agency relationship does not answer the more fundamental question whether Greenberg accurately conveyed Comcast's demand, which neither Comcast nor Allen & Company deny in their submissions that Greenberg did. Ultimately, the facts on this claim can only be resolved through appropriate discovery.

Comcast argues that any suggestion of an agency relationship between Comcast and Greenberg is unfounded and therefore sanctionable. In fact, TCR had a good faith basis for its allegation that Greenberg was acting on Comcast's behalf.[112] Furthermore, Comcast's claim that MLB had informed TCR that Greenberg was not acting as Comcast's agent is itself incorrect.

First, the affidavits submitted by Comcast do not deny the existence of a long-standing (and ongoing) relationship between Comcast and Allen & Company. Allen & Company has

[111] Answer ¶ 20.

[112] Comcast makes much of the fact that the complaint did not include a "written verification" by counsel and suggests that the failure to include such a verification is evidence of a lack of good faith basis for the allegations in the complaint. *See* Answer ¶ 16 & n.26 (citing 47 C.F.R. 76.6(a)(4)). In fact, the complaint was supported by an affidavit by the "complainant" (*i.e.*, a senior official at TCR), which appears to be what the rule contemplates. 47 C.F.R. § 76.6(a)(4) (requiring signature of "the complainant"). In the one other instance in which a program carriage complaint was filed, it was also supported by an affidavit from the complainant, rather than a verification by counsel for the complainant. Complaint Ex. 15 (Affidavit of Stephen Greenberg attached to Carriage Agreement Complaint, *In re Classic Sports Network, Inc.*, CSR Docket No. 97-171 (FCC filed Mar. 17, 1997)). Regardless, to the extent that the Commission wants a verification from counsel, counsel is happy to provide it. Written verification is accordingly attached both for this reply and for the original complaint.

been involved in an ongoing series of transactions that have inured to Comcast's benefit.[113] In addition, the Complaint notes that Greenberg is well known in the sports industry to have facilitated the creation of various regional sports networks in which Comcast received substantial equity interests.[114] As such, the Complaint alleges that Comcast continuously employed Allen & Company for various asset transactions and that Allen & Company has a reputation for participating in the establishment of regional sports networks in which Comcast holds a significant equity interest. [115]

Moreover, there are a number of additional facts that support the existence of a principal-agent relationship between Comcast and Allen & Company. For example, Allen & Company itself acknowledges that Comcast is a longtime mergers and acquisitions client,[116] and media articles indicate that Comcast CEO Brian Roberts has long had close ties to Allen & Company's top leadership.[117] Indeed, Allen & Company and/or its affiliates also hold substantial blocks of Comcast stock. According to filings with the United States Securities and Exchange Commission, for the period ending March 31, 2005, Allen & Company and/or its affiliates held

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[113] *See* Complaint ¶¶ 30, 32-33.

[114] *Id*. ¶¶ 32-33.

[115] Given that TCR has long been involved in the ownership, licensing, and broadcast of regional sports programming, it comes within the class of persons that would be aware of and rely upon the existing relationship between Allen & Company and Comcast.

[116] *See* Ex. 22 (Affidavit in Support of Debtors' Application for Order Under 11 U.S.C. §§ 327(a) and 328(a) Authorizing Retention of Allen & Company LLC as Investment Banker to the Debtors, *In re Adelphia Comms. Corp., et. al.*, No. 02-41729 at Schedule 1 (Bankr. S.D.N.Y. filed July 26, 2004)) (affidavit signed by Rosemary Fanelli, Chief Compliance Officer and Secretary – Allen & Company LLC; attached schedule lists "Allen & Company clients for the past five years . . . which appear[] on Adelphia's Potential Parties-in-Interest list" and including "Comcast Corporation (M&A Assignments)"); *see also* Zaragosa Letter at 3 ("it is indeed true that Allen . . . has provided advice to Comcast on various matters from time to time.").

[117] Since at least the early 1990s, Roberts has participated in an annual conference that Allen & Company hosts in Sun Valley, Idaho, for high-level executives at firms with which it does business and seeks to do business. *See* Ex. 23 (D. Machan, *Herbert Allen and his Merry Dealsters*, Forbes, July 1, 1996; T. Arango, *Eisner Airs Disney's Dirty Laundry in Gripe Session*, N.Y. Post, July 10, 2004) (noting that Comcast CEO Brian Roberts was a guest at Herbert Allen's "annual A-list dinner" during Allen & Company's exclusive annual conference in Sun Valley, Idaho).

five blocks of Comcast stock worth approximately $31.5 million.[118] Notably, from the time that Greenberg began engaging in contacts with the Orioles and TCR and expressing demand for an equity interest for Comcast as a condition of carriage, Allen & Company and/or its affiliates increased their combined holdings of Comcast stock more than four-fold from less than a quarter of a million shares to nearly one million shares.[119] Allen & Company and/or its affiliates held and increased an equity interest in Comcast during the entire period in which Greenberg made presentations to the Orioles about Comcast's potential carriage of baseball games – and its demand for equity.[120]

In addition, at the very time Greenberg was telling the Orioles that they could not obtain distribution of a two-team RSN without giving Comcast an equity interest, a sports network founded by Greenberg (College Sports Television Network ("CSTV")) was negotiating with Comcast and is believed to have obtained a distribution agreement with Comcast without giving up an equity interest.[121] Those simultaneous negotiations in the summer of 2004, which were not disclosed to Orioles' representatives, at the very least raise a substantial issue whether Greenberg and Allen & Company had a conflict of interest, because Greenberg and Allen both are reported to hold equity positions in CSTV.[122] At the same time Greenberg was purporting to be an honest

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[118] *See* Ex. 24 (Allen Holding Inc., Form 13F-HR for period ending March 31, 2005 (SEC filed May 12, 2005) ("May 12, 2005 Form 13F-HR")).

[119] Ex. 25 (Allen Holding Inc., Form 13F-HR for period ending September 30, 2004) (SEC filed Nov. 12, 2004) ("Nov. 12, 2004 Form 13F-HR"); Ex. 26 (Allen Holding Inc., Form 13F-HR for period ending December 31, 2004 (SEC filed Feb. 10, 2005); Ex. 24 (May 12, 2005 Form 13F-HR).

[120] Based on previous years' filings, Allen & Company has owned Comcast stock since at least 1999 and during the relevant time period at issue in the complaint. *See, e.g.*, Ex. 25 (Nov. 12, 2004 Form 13F-HR); Ex. 27 (Allen Holding Inc., Form 13F-HR for period ending March 31, 1999 (SEC filed May 17, 1999)).

[121] *See* Ex. 28 (College Sports Television, *CSTV: College Sports Television Reaches Distribution Agreement with Comcast*, July 29, 2004; Don Steinberg, *Comcast Plans to Add College Sports Channel*, Phila. Inquirer, July 30, 2004, at C02).

[122] *See* Ex. 29 (CSTV website, "About Us: Founder Bios," *available at* http://www.collegesports.com /online/cstv-bios.html (last visited Aug. 3, 2005); News Release, CSTV, JPMorgan Partners Invest $25 Million in CSTV (Aug. 11, 2004) ("CSTV investors include . . . Allen & Co."). In that same time period, CSTV reached a deal with INHD, "cable's most widely distributed all high-definition network," which is owned in part by Comcast

broker on behalf of MLB in telling the Orioles they had no choice but to give up equity in exchange for carriage with Comcast, Greenberg's CSTV was cutting its own deal with Comcast. At the very least, that conduct raises serious and disturbing questions and warrants further investigation.

Comcast asserts that MLB notified TCR prior to the filing of the complaint that Greenberg was not an agent of Comcast.[123] This is incorrect. Because the notice letter by TCR to Comcast did not mention Greenberg, MLB had no occasion to "correct" any "fact" supposedly concerning Greenberg in the Complaint. Comcast's and Allen's high-strung accusations of impropriety are simply efforts to avoid this Commission's examination of the fact of their close relationship and the illegality of Comcast's demand for equity in exchange for carriage. The fact that Greenberg may have been employed by MLB proves nothing about whether he may also have been acting as an agent for Comcast. *See, e.g.*, Restatement 2d of Agency § 14L(1) & cmt. c (1958) (stating that a person may be the agent of more than one party to a transaction and noting that "a statement in the contract of the parties that he is the agent of one of them is not conclusive, nor is the fact that he receives his compensation from one of them").

These facts, taken together, and coupled with the specificity of Greenberg's statements regarding Comcast's demands, reasonably gave rise to the inference that Greenberg was not merely conveying those demands as MLB's agent, but also representing Comcast's interests in the transaction. Greenberg has denied this allegation. But the specific question of agency or apparent agency – as well as any questions regarding Allen & Co.'s potential conflicts of interest – need not be resolved to decide TCR's complaint. What must be resolved is what Comcast told

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IN DEMAND Holdings, Inc, a subsidiary of Comcast Corporation. *See* Ex. 30 (Press Release, WEHT News25, INHD and CSTV: College Sports Television Announces Exclusive High-Definition Agreement (Sept. 8, 2004); Comcast Corp., Form 10-K at Exhibit 21 (SEC filed Feb. 23, 2005) (listing Comcast in Demand Holdings, Inc. as a subsidiary)).

[123] Answer ¶ 17.

Greenberg and Allen & Co. and when. The critical question is whether Greenberg accurately conveyed Comcast's demand for an equity interest. Neither Comcast nor Allen denies that the substance of Greenberg's statements to Orioles representatives accurately conveyed Comcast's illegal demand.

C. Comcast Demanded a Equity Interest in Exchange for Carriage – Not To Compensate Comcast for Programming It Would Contribute To the Network

Comcast also claims that any demands it may have made for equity through Greenberg were appropriate because Comcast was not demanding equity in exchange for carriage but rather was proposing to exchange equity for equity by contributing its own programming rights.[124] That argument is inconsistent with the facts.

Comcast argues that its contribution of its limited term rights to the Orioles, Wizards, and Capitals to a hypothetical four-team regional sports network "entitle" it to an equity stake in such a network.[125] But the principal proposal advanced by Greenberg was a two-team Nationals-Orioles regional sports network.[126] Comcast has nothing substantial to contribute to *that* proposed network, because its license to produce and exhibit certain pay television Orioles games expires after the 2006 season and CSN was on notice that TCR had no intent to renew that deal after serious negotiations beginning in early 2001 and extending over 18 months had failed.[127] Moreover, TCR has never contested that Comcast has a right to obtain reasonable compensation for the contribution of its limited-term rights to such a network. But, as communicated by Greenberg, Comcast's proposed equity grab in the contemplated two-team RSN goes well beyond such reasonable compensation, and constitutes an illegal demand for an

[124] Answer ¶¶ 21-25.

[125] *See id.* ¶ 24.

[126] *See* Complaint ¶¶ 34-37.

[127] *See id.* ¶ 17.

equity interest in such a network. From TCR's perspective, such a demand is also commercially foolhardy, because TCR would have been supplying the bulk of the programming content to that proposed network.[128] While Comcast claims that it was not demanding equity in exchange for carriage, the fact remains that, now that the Orioles and TCR have rebuffed Comcast's demands for an outrageously large equity stake, Comcast refuses to engage in any meaningful and good-faith negotiations over the carriage of TCR's programming content.

III. TCR'S REQUESTED REMEDIES ARE BOTH AUTHORIZED AND APPROPRIATE

Comcast argues that both of TCR's requested remedies – mandatory carriage and damages – are "impermissible" and "unjustified."[129] In fact, both remedies are not only authorized, but appropriate in this case.

A. Mandatory Carriage Is Both Authorized and Appropriate

Comcast argues, first, that mandatory carriage "would require Comcast to delete two basic tier channels on its systems in the greater Washington area," a remedy that Comcast claims the Commission has indicated it will provide only "in extraordinary circumstances and only subject to strict due process requirements."[130]

First, adopting TCR's mandatory carriage request would not necessarily require Comcast to delete any channels from its basic tier. Although Comcast claims that "[a]ll that TCR says is that Comcast should provide carriage on the same terms other MVPDs have provided MASN (*plus* any other terms the Commission deems appropriate),"[131] in fact, in both its Complaint and

[128] Complaint ¶¶ 35, 37. Given that TCR has been granted the exclusive right to produce and exhibit the Orioles and Nationals games in perpetuity, these rights are clearly more substantial than the limited term rights held by Comcast.

[129] *See* Answer § IV(B) at 34.

[130] *See id.* ¶ 57; *see also id.* ¶¶ 44-45.

[131] *Id.* ¶ 57 n.110 (emphasis added).

its Emergency Petition for Temporary Injunctive Relief, TCR requests mandatory carriage under any of three conditions, two of which make no mention, direct or indirect, of basic tier channels: "under the same terms and conditions that TCR has received from other multichannel video programming distributors, *or* such other terms and conditions as the Commission shall deem just and reasonable, *or* such other terms and conditions as shall be established through binding independent arbitration."[132] Thus, while the carriage terms that TCR has proposed to Comcast and other MVPDs provide for the inclusion of TCR's programming on basic *or expanded basic* tiers,[133] and while TCR obviously remains content to extend to Comcast these terms, TCR has not insisted on carriage at any particular level of penetration, but has instead left all terms and conditions, including penetration level, to the discretion of the Commission or arbitrator.

Second, even as to a requirement that Comcast carry Nationals games on its basic tier, there is no basis for Comcast's claim that the Commission will grant such relief only "in extraordinary circumstances and subject to strict due process requirements."[134] First, if the Commission had wanted to indicate its view of mandated carriage as "extraordinary," it need only have relied on the recommendations in some of the comments that "the Commission should use a remedy of mandatory carriage only rarely," and "should not always rely on [it], even when wrongful conduct has occurred."[135] It did not do so. Instead, the Commission noted that "the record offers little guidance . . . and in particular provides little insight on the appropriate scope

[132] Complaint at 33 (emphasis added); *see also* Emergency Petition at 2, 15.

[133] *See* Complaint Exs. 21, 28 (Apr. 13 Term Sheet, May 13 Term Sheet). Thus, even under the terms of TCR's prior proposals to Comcast, Comcast was not "require[d]…to delete two *basic* tier channels on its systems in the greater Washington area." Answer ¶ 57 (emphasis added).

[134] Answer ¶ 57.

[135] *Program Carriage Order* ¶ 22 (discussing comments of Continental).

and duration of relief in the form of mandatory carriage."[136] Rather than prejudging certain remedies to be "extraordinary," the Commission announced that it would "determine the appropriate relief for program carriage violations on a case-by-case basis."[137]

Comcast nevertheless pursues its claim by contending that 47 C.F.R. § 76.1302(g)(1), which it says "requir[es] full Commission approval before an MVPD is ordered to drop an existing programming service," shows that the Commission "has made clear that such relief should only be provided in extraordinary circumstances and subject to strict due process requirements." This is a mischaracterization of the Commission's regulation. Section 76.1302(g) does *not* "requir[e] full Commission approval before an MVPD is ordered to drop an existing programming service," as Comcast claims.[138] The rule merely provides that "*if the defendant seeks review* of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission."[139] Staying an injunction-like remedy until that judgment attains finality hardly constitutes the Commission "ma[king] clear that such relief should only be provided in extraordinary circumstances and only subject to strict due process requirements."[140] In fact, § 76.1302(g) provides that if the Commission upholds the remedy, "the defendant will be required to carry the video

[136] *Id.* ¶ 26. Since there has only been one other claim filed under § 76.1301, and that case resolved without any order for remedies, *see* Ex. 31 (Joint Stipulation of Dismissal, *In re Classic Sports Network, Inc.*, CSR Docket No. 97-171 (FCC filed Dec. 16, 1997)), the record provides no more insight today than it did when the Commission wrote these words.

[137] *Program Carriage Order* ¶ 26; *see also id.* ¶ 27 ("Given the wide range of behavior that may potentially give rise to a violation of the rules adopted herein to implement Section 616, we believe that a case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only reasonable and meaningful method of enforcing Section 616.").

[138] Answer ¶ 57 & n.111.

[139] 47 C.F.R. § 76.1302(g)(1) (emphasis added).

[140] Answer ¶ 57.

programming vendor's programming *for an additional period* equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling."[141] Far from indicating that mandated carriage involving the deletion of channels is "extraordinary," § 76.1302(g) specifically contemplates that "appropriate remedies" may include mandatory carriage, and that such carriage may "require the defendant [MVPD] to delete existing programming from its system."[142]

This proposal for relief is all the more reasonable in light of the fact that Comcast itself would have had to engage in a similar adjustment had CSN been successful in its negotiations for the rights to produce and exhibit Nationals games. Those negotiations by Comcast continued right up until the March 28 Settlement between the Orioles, TCR, and MLB – *i.e.*, the eve of the 2005 MLB season. Had Comcast been successful, it would have had to find a way to televise Nationals games consistent with its other channel and programming demands. Given that Comcast evidently believed that telecasting Nationals games was feasible for itself and its affiliated programming vendor, there is no reason for the Commission to perceive unnecessary difficulties simply because an *un*affiliated programming vendor obtained those production and exhibition rights.

In its final attack on TCR's request for mandatory carriage, Comcast argues that "[t]he Commission should deny TCR's Complaint because TCR failed to satisfy the Commission's procedural requirements" by "fail[ing] to provide the information needed to determine appropriate terms and conditions of carriage."[143] Comcast claims that "[a]ll that TCR says is that Comcast should provide carriage on the same terms other MVPDs have provided MASN (plus

[141] 47 C.F.R. § 76.1302(g)(1) (emphasis added).

[142] 47 C.F.R. § 76.1302(g)(1).

[143] Answer ¶ 57 & n.110 (citing the *Program Carriage Order* ¶ 29).

any other terms the Commission deems appropriate)" yet "TCR does not detail . . . the key carriage terms from MASN's deals with DirecTV and RCN."[144] First, again, TCR proposed three distinct mandatory carriage remedies, two of which involve leaving specific terms and conditions in the hands of the Commission or an arbitrator.

Second, with respect to TCR's proposal that the Commission mandate that Comcast carry TCR's programming under "the same terms and conditions that TCR has received from other multichannel video programming distributors,"[145] TCR notes in its Complaint that the terms it proposed to Comcast on May 13, 2005, which TCR included as Exhibit 28, *are* "the same terms and conditions given to other MVPDs."[146] Thus, TCR has clearly provided both Comcast and the Commission with TCR's "desired duration and terms of . . . carriage,"[147] "such as the existence of comparable terms in other program carriage agreements to which either the complainant or the defendant is a party."[148] Even without this explicit statement, common sense suggests that the terms and conditions TCR desires the Commission to impose on Comcast are those that TCR most recently proposed to Comcast, copies of which TCR specifically included as an Exhibit to its Complaint before the Commission.

B. The Commission Has The Authority To Award Damages for Violations of Its Carriage Rules

Comcast also incorrectly argues that "neither the program carriage statute nor the Commission's rules authorize the Commission to grant damages as a remedy in a program

[144] *Id.* ¶ 57 n.110.

[145] Complaint at 33.

[146] *Id.* ¶ 54 (citing Complaint Ex. 28 (May 13 Term Sheet)).

[147] *Program Carriage Order* ¶ 29.

[148] *Id.* ¶ 27.

carriage complaint."[149] The Commission has already determined that identical language gives it the authority to impose damages.

In § 628(e)(1) of the Communications Act, which pertains to cable program access, Congress granted the Commission the authority "to order *appropriate remedies, including*, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."[150] Section 628(e)(2) further states that "[t]he remedies in paragraph (1) are *in addition to* and not in lieu of the remedies available under subchapter V of this chapter or any other provision of this Act."[151] In response to comments that argued that this language does not authorize the Commission to award damages, the Commission concluded that such language in fact

> provides the Commission with broad authority to order appropriate remedies. In our judgment, this authority is broad enough to include any remedy the Commission reasonably deems appropriate, including damages. Although . . . the statute does not expressly use the term "damages," it does expressly empower the Commission to order "appropriate remedies." Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language . . . is consistent with a finding that the Commission has authority to afford relief in the form of damages.[152]

The Commission later affirmed that "the appropriate interpretation of the term 'including'" is that it is "illustrative, rather than exclusive."[153]

With respect to program carriage, § 616(a)(5) similarly directs the Commission to "provide for *appropriate penalties and remedies* for violations of this subsection, including

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[149] Answer ¶ 58.

[150] 47 U.S.C. § 648(e)(1) (emphasis added).

[151] *Id.* § 648(e)(2) (emphasis added).

[152] Memorandum Opinion and Order on Reconsideration of First Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 1902, ¶ 17 (1994) ("*Program Access Order*").

[153] *See* Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, ¶ 14 (1998) ("*Ameritech Order*"); *see id.* ¶ 15.

carriage."[154] The Commission's regulation implementing that section borrows from Congress's language in the program access statute, and provides that "the Commission shall order *appropriate remedies, including,* if necessary, mandatory carriage . . . , or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming."[155] The Commission's regulations further provide that "the remedies provided in paragraph (g)(1) of this section are *in addition to* and not in lieu of the sanctions available under title V or any other provision of the Communications Act."[156]

Since the Commission has already held that this language is "broad enough to include any remedy the Commission reasonably deems appropriate, including damages,"[157] Comcast's argument that there is "no basis for TCR's request for damages"[158] is itself without basis. Moreover, as we discuss above,[159] the Commission has made clear that it will not prejudge the appropriateness or inappropriateness of any remedy in any given situation, but instead "will determine the appropriate relief for program carriage violations on a case-by-case basis."[160] Thus, there is ample authority under both the carriage statute and the Commission's own rules for the Commission to award damages to TCR.

Moreover, although Comcast argues, citing the *Program Access Order*, that "where the Commission has determined that damages are an appropriate remedy in other cable-related contexts, it has done so as part of a formal rulemaking, not in individual adjudications,"[161] the

[154] 47 U.S.C. § 536(a)(5) (emphasis added).

[155] 47 C.F.R. § 76.1302(g)(1).

[156] *Id.* § 76.1302(g)(2).

[157] *Program Access Order* ¶ 17; *see also Ameritech Order* ¶ 10.

[158] Complaint ¶ 58.

[159] *See supra* note 137 (discussing this portion of the *Program Carriage Order*).

[160] *Program Carriage Order* ¶ 26.

[161] Answer ¶ 58 & n.114 (citing *Program Access Order* ¶¶ 16-18).

Commission has in fact explicitly said that "[w]here … there are circumstances through *either rulemaking or adjudicatory proceedings*, such that a program access defendant knew, or should have known, that it was engaging in conduct violative of § 628, damages are appropriate and will be imposed."[162]

Finally, the fact that the Commission has amended its program access regulations to explicitly provide for damages but has not done so in the program carriage context is not, as Comcast contends,[163] meaningful. The Commission amended its program access regulations after being petitioned to do so;[164] it has received no similar petition to amend its program carriage rules.

IV. TCR'S EMERGENCY PETITION ESTABLISHES AN ENTITLEMENT TO IMMEDIATE INJUNCTIVE RELIEF

In ruling on TCR's claim for emergency injunctive relief, the Commission must evaluate: (1) TCR's likelihood of success on the merits; (2) the threat of irreparable harm; (3) the degree of injury to other parties if relief is granted; and (4) whether the grant of relief furthers the public interest.[165] Injunctive relief is appropriate either where the moving party shows a likelihood of success on the merits and irreparable injury or where there is a "serious" question on the merits and a "substantial" showing regarding the balance of the equities.[166]

As discussed above, given the brazenness of Comcast's effort to discriminate against TCR's programming content in favor of Comcast's own competing regional sports network, as

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[162] *Ameritech Order* ¶ 18 (emphasis added).

[163] *See* Answer ¶ 58 & n.115.

[164] *See* Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 12 FCC Rcd 22840 (1997).

[165] *See AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508, ¶¶ 13-14 (1998) ("*AT&T Order*").

[166] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

well as Comcast's demand for an equity interest in TCR's programming content, TCR has shown a substantial likelihood of success on the merits of its claims. In weighing the equities in this matter, the Commission must give paramount importance to considerations of public interest.[167] The protection offered by the Commission's program carriage rules, while rarely invoked, is designed to prevent the very activities Comcast has engaged in here – holding the public (and a programming vendor) hostage in order to discriminate in favor of an affiliated vendor or to obtain an equity interest in the vendor's programming service. Even though Comcast itself vigorously negotiated for the rights to televise what it correctly presumed would be enormously popular Nationals baseball games, Comcast now refuses to distribute TCR's production of those games. As a result, millions of fans in the Washington area and throughout the Orioles and Nationals shared home television territory are being deprived of the opportunity to watch the Nationals fight for a playoff berth in their inaugural season.

Moreover, TCR faces irreparable harm in that Comcast is depriving TCR of its best opportunity to attract Nationals fans and other customers to the core of its programming content. Because public interest in the Nationals is extremely high, allowing Comcast to deny TCR access to the vast majority of MVPD subscribers in the Washington area at this unique time greatly undermines TCR's ability to effectively reach out to a broad base of potential customers.

Comcast's claim that it will suffer substantial harm if emergency relief is granted is false.[168] The emergency petition does not *require* that Comcast carry Nationals games as part of any particular offering.[169] As such, Comcast's claim that it will be *required* to "drop" one or more programming services if emergency relief is granted is inaccurate. In addition, Comcast

[167] *See AT&T Order* ¶ 14.

[168] *See* Answer ¶ 69.

[169] *See* Emergency Petition at 15 (stating that the Commission may set any terms for carriage that it determines are just and reasonable).

has offered no evidence to support its argument that the licensing fees sought by TCR are inordinately high.[170] To the contrary, TCR has stipulated that emergency relief may be granted "under the *same terms and conditions that TCR has received from other multi-channel video program distributors* or such other terms and conditions as the Commission deems just and reasonable."[171] Finally, Comcast's claim that the public interest would not be served through the grant of emergency relief because the Commission has "expressly and properly recognized the superiority of private commercial negotiations in addressing relationships between video programmers and program distributors" turns the Commission's program carriage rules on their head. It is the *very fact* that Comcast has refused to engage in just such "private commercial negotiations" over the carriage of the Nationals baseball games that *warrants* the grant of emergency relief in this case. If the program carriage rules are to have any content whatsoever, they must bar the type of blatantly anti-competitive activities that Comcast has engaged in with respect to TCR.

V. TCR IS ENTITLED TO THE DISCOVERY REQUESTED IN ITS MOTION

While TCR believes that its Complaint as filed contains a sufficient basis for the Commission to grant relief against Comcast, to the extent any factual disputes exist, they counsel in favor of granting the discovery sought by TCR.

Comcast argues that discovery is not justified in this action because Congress provided for "expedited review" of complaints of improper discrimination by video programming vendors.[172] Comcast itself concedes, however, that discovery is explicitly authorized by the Commission's rules and the Commission staff is authorized to permit discovery as needed on a

[170] *See* Answer ¶ 69.

[171] Emergency Petition at 15 (emphasis added).

[172] *See* Answer ¶¶ 71-72.

case-by-case basis.[173] Moreover, the very rules and expedited process that Comcast cites as supporting its position that discovery on behalf of TCR is *not justified* are rules and procedures enacted for the *protection* of independent video programming vendors like TCR, against the depredations of powerful monopoly cable providers like Comcast. Where, as here, discovery may assist the Commission in considering the core allegations made by the complaining video programming vendor, discovery should be permitted in the exercise of the Commission's discretion.

Respectfully submitted,

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Dated: August 3, 2005

[173] *Id.* ¶ 71; 47 C.F.R. § 76.7(f)(1); *Program Carriage Order* ¶ 23.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
TCR Sports Broadcasting Holding, L.L.P.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. _____
	)	
Comcast Corporation,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF JOSEPH E. FOSS

Joseph E. Foss declares, under penalty of perjury, as follows:

1. My name is Joseph E. Foss. I am over the age of 21 years and have personal knowledge of the facts contained herein.

2. I am Vice Chairman of Baltimore Orioles Limited Partnership. I spend a considerable amount of time managing TCR Sports Broadcasting Holdings, L.L.P., the complainant in this action. This affidavit is being made pursuant to Section 76.1302(c)(2) of the Federal Communications Commission.

3. I have read the complaint and reply in this matter. To the best of my knowledge, information and belief formed after reasonable inquiry, the complaint is well grounded in fact and is warranted under Commission regulations and policies. The complaint is not interposed for any improper purpose.

I swear that the above statements are true to the best of my knowledge.

Joseph E. Foss

August 2, 2005

Sworn to and signed before me
this 2nd day of August, 2005

Audrey M Brown
Notary Public

MY COMMISSION EXPIRES:
Oct 1, 2007

Audrey M. Brown
Notary Public State of MD.
My Commission Expires: Oct 1, 2007

ADDENDUM

Statute and Regulation Provisions

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Statutory Provisions:

Regulatory Provisions:

47 U.S.C.A. § 536

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter V-A. Cable Communications
Part II. Use of Cable Channels and Cable Ownership Restrictions

➡§ 536. Regulation of carriage agreements

(a) Regulations

Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(b) "Video programming vendor" defined

As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

CREDIT(S)

(June 19, 1934, c. 652, Title VI, § 616, as added Oct. 5, 1992, Pub.L. 102-385, § 12, 106 Stat. 1488.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

47 U.S.C.A. § 536

1992 Acts. Senate Report No. 102-92 and House Conference Report No. 10- 862, see 1992 U.S. Code Cong. and Adm. News, p. 1133.

Effective and Applicability Provisions

1992 Acts. Section effective 60 days after Oct. 5, 1992, see section 28 of Pub.L. 102-385, set out as a note under section 325 of this title.

LAW REVIEW COMMENTARIES

Newscasts as property: Will retransmission consent stimulate production of more local television news? Lorna Veraldi, 46 Fed.Comm.L.J. 469 (1994).

Regulation of the video marketplace: Access duties under the Video Dialtone Order & the Cable Television Consumer Protection and Competition Act of 1992. 2 Vill.Sports & Ent.L.F. 261 (1995).

LIBRARY REFERENCES

American Digest System

Telecommunications 449.5(4.1).

Key Number System Topic No. 372.

47 U.S.C.A. § 536, **47 USCA § 536**

Current through P.L. 109-39, approved 07-27-05

END OF DOCUMENT

47 U.S.C.A. § 548

Effective: February 08, 1996

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A--CABLE COMMUNICATIONS
PART III--FRANCHISING AND REGULATION

➡§ 548. Development of competition and diversity in video programming distribution

(a) Purpose

The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

(b) Prohibition

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

(c) Regulations required

(1) Proceeding required

Within 180 days after October 5, 1992, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by subsection (b) of this section.

(2) Minimum contents of regulations

The regulations to be promulgated under this section shall--

(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;

(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

(iv) entering into an exclusive contract that is permitted under subparagraph (D);

(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992; and

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

(3) Limitations

(A) Geographic limitations

Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

(B) Applicability to satellite retransmissions

Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming, or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

(4) Public interest determinations on exclusive contracts

In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

(E) the duration of the exclusive contract.

(5) Sunset provision

The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after October 5, 1992, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

(d) Adjudicatory proceeding

Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b) of this section, or the regulations of the Commission under subsection (c) of this section, may commence an adjudicatory proceeding at the Commission.

(e) Remedies for violations

(1) Remedies authorized

Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

(2) Additional remedies

The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under subchapter V of this chapter or any other provision of this chapter.

(f) Procedures

The Commission shall prescribe regulations to implement this section. The Commission's regulations shall--

(1) provide for an expedited review of any complaints made pursuant to this section;

(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(g) Reports

The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c) of this section, annually report to Congress on the status of competition in the market for the delivery of video programming.

(h) Exemptions for prior contracts

(1) In general

Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of

subsection (c)(2)(C) of this section shall apply for distribution to persons in areas not served by a cable operator.

(2) Limitation on renewals

A contract that was entered into on or before June 1, 1990, but that is renewed or extended after October 5, 1992, shall not be exempt under paragraph (1).

(i) Definitions

As used in this section:

(1) The term "satellite cable programming" has the meaning provided under section 605 of this title, except that such term does not include satellite broadcast programming.

(2) The term "satellite cable programming vendor" means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

(3) The term "satellite broadcast programming" means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

(4) The term "satellite broadcast programming vendor" means a fixed service satellite carrier that provides service pursuant to section 119 of Title 17 with respect to satellite broadcast programming.

(j) Common carriers

Any provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this subsection, two or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company).

Current through P.L. 109-39, approved 07-27-05

END OF DOCUMENT

C

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C--BROADCAST RADIO SERVICES
PART 76--MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART A--GENERAL
Current through July 15, 2005; 70 FR 41121

§ 76.7 General special relief, waiver, enforcement, complaint, show cause, forfeiture, and declaratory ruling procedures.

(a) Initiating pleadings. In addition to the general pleading requirements, initiating pleadings must adhere to the following requirements:

(1) Petitions. On petition by any interested party, cable television system operator, a multichannel video programming distributor, local franchising authority, or an applicant, permittee, or licensee of a television broadcast or translator station, the Commission may waive any provision of this part 76, impose additional or different requirements, issue a ruling on a complaint or disputed question, issue a show cause order, revoke the certification of the local franchising authority, or initiate a forfeiture proceeding. Petitions may be submitted informally by letter.

(2) Complaints. Complaints shall conform to the relevant rule section under which the complaint is being filed.

(3) Certificate of service. Petitions and Complaints shall be accompanied by a certificate of service on any cable television system operator, franchising authority, station licensee, permittee, or applicant, or other interested person who is likely to be directly affected if the relief requested is granted.

(4) Statement of relief requested.

(i) The petition or complaint shall state the relief requested. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.

(ii) The petition or complaint shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(iii) A petition or complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition or complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(5) Failure to prosecute. Failure to prosecute petition or complaint, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice if it occurs prior to the adoption date of any final action taken by the Commission with respect to the initiating pleading.

(b) Responsive pleadings. In addition to the general pleading requirements, responsive pleadings must adhere to the following requirements:

(1) Comments/oppositions to petitions. Unless otherwise directed by the Commission, interested persons may submit comments or oppositions within twenty (20) days after the date of public notice of the filing of such petition. Comments or oppositions shall be served on the petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied on.

(2) Answers to complaints.

(i) Unless otherwise directed by the Commission, any party who is served with a complaint shall file an answer in accordance with the following, and the relevant rule section under which the complaint is being filed.

(ii) The answer shall be filed within 20 days of service of the complaint, unless another period is set forth in the relevant rule section.

(iii) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral

or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any party against whom a complaint is filed failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(iv) The answer shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(v) Averments in a complaint are deemed to be admitted when not denied in the answer.

(c) Reply. In addition to the general pleading requirements, reply comments and replies must adhere to the following requirements:

(1) The petitioner or complainant may file a reply to a responsive pleading which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. Unless expressly permitted by the Commission, reply comments and replies to an answer shall not contain new matters.

(2) Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein.

(3) Unless otherwise directed by the Commission or the relevant rule section, comments and replies to answers must be filed within ten (10) days after submission of the responsive pleading.

(d) Motions. Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(e) Additional procedures and written submissions.

(1) The Commission may specify other procedures, such as oral argument or evidentiary hearing directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits.

(3) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(i) These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(ii) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(iii) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(f) Discovery.

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff

may hold a status conference with the parties, pursuant to § 76.8 of this part, to determine the scope of discovery, or direct the parties regarding the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff may advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (g) of this section.

(g) Referral to administrative law judge.

(1) After reviewing the pleadings, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any proceeding or discrete issues arising out of any proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Media Bureau Chief, the Media Bureau Chief shall not be deemed to be a party to a proceeding designated for a hearing before an administrative law judge pursuant to this paragraph (g).

(h) System community units outside the Contiguous States. On a finding that the public interest so requires, the Commission may determine that a system community unit operating or proposing to operate in a community located outside of the 48 contiguous states shall comply with provisions of subparts D, F, and G of this part in addition to the provisions thereof otherwise applicable.

(i) Commission ruling. The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute, issue an order to show cause, or initiate a forfeiture proceeding.

Notes 1 through 4 to § 76.7:

Note 1: After issuance of an order to show cause pursuant to this section, the rules of procedure in Title 47, part 1, subpart A, § § 1.91-1.95 of this chapter shall apply.

Note 2: Nothing in this section is intended to prevent the Commission from initiating show cause or forfeiture proceedings on its own motion; Provided, however, that show cause proceedings and forfeiture proceedings pursuant to § 1.80(g) of this chapter will not be initiated by such motion until the affected parties are given an opportunity to respond to the Commission's charges.

Note 3: Forfeiture proceedings are generally nonhearing matters conducted pursuant to the provisions of § 1.80(f) of this chapter (Notice of Apparent Liability). Petitioners who contend that the alternative hearing procedures of § 1.80(g) of this chapter should be followed in a particular case must support this contention with a specific showing of the facts and considerations relied on.

Note 4: To the extent a conflict is perceived between the general pleading requirements of this section, and the procedural requirements of a specific section, the procedural requirements of the specific section should be followed.

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13864, July 14, 1972; 39 FR 6707, Feb. 22, 1974; 40 FR 54794, Nov. 26, 1975; 42 FR 19345, April 13, 1977; 42 FR 64688, Dec. 28, 1977; 43 FR 49008, Oct. 20, 1978; 45 FR 60299, Sept. 11, 1980; 51 FR 44608, Dec. 11, 1986; 52 FR 5770, Feb. 26, 1987; 52 FR 10231, March 31, 1987; 57 FR 35472, Aug. 10, 1992; 58 FR 17358, April 2, 1993; 59 FR 62344, Dec. 5, 1994; 64 FR 6569, Feb. 10, 1999; 64 FR 36605, July 7, 1999; 67 FR 13234, March 21, 2002]

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § 76.7

47 CFR § 76.7

END OF DOCUMENT

C

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C--BROADCAST RADIO SERVICES
PART 76--MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE
SUBPART Q--REGULATION OF CARRIAGE AGREEMENTS
Current through July 15, 2005; 70 FR 41121

§ 76.1301 Prohibited practices.

(a) Financial interest. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) Exclusive rights. No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § 76.1301

47 CFR § 76.1301

END OF DOCUMENT

C

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
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Current through July 15, 2005; 70 FR 41121

§ 76.1302 Carriage agreement proceedings.

(a) Complaints. Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) Prefiling notice required. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(c) Contents of complaint. In addition to the requirements of § 76.7 of this part, a carriage agreement complaint shall contain:

(1) The type of multichannel video programming distributor that describes complainant, the address and telephone number of the complainant, and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(3) For complaints alleging a violation of § 76.1301(c) of this part, evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly.

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (b) of this section has been made.

(d) Answer.

(1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(e) Reply. Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(f) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video

programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

(g) Remedies for violations--

(1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) Additional sanctions. The remedies provided in paragraph (g)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

[59 FR 43777, Aug. 25, 1994; 64 FR 6574, Feb. 10, 1999; 64 FR 36605, July 7, 1999]

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § 76.1302

47 CFR § 76.1302

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of August 2005, I caused one copy of Complainant's Reply in Support of Carriage Agreement Complaint to be served on the following parties by UPS Next Day Air:

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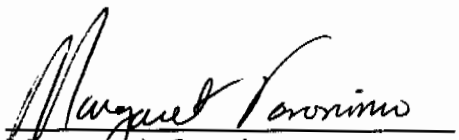

Margaret A. Jeronimo